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REPORTS  
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*Chase and Wilson*

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

*2882 F*

OF

THE STATE OF MISSOURI.

BY

CHAS. C. WHITTELSEY,

REPORTER.

VOL. IX.

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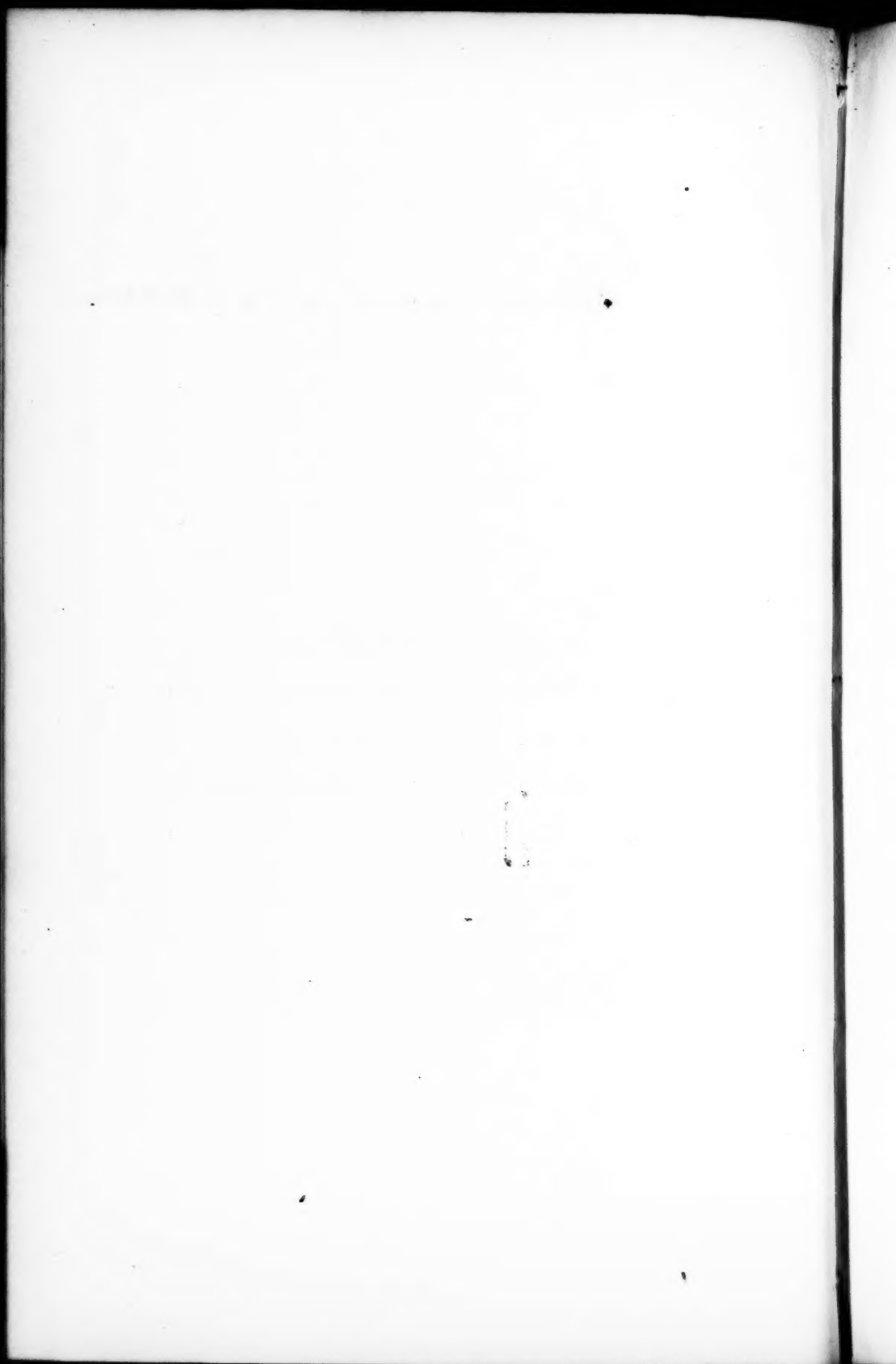
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CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
MARCH TERM, 1867, AT ST. LOUIS.

[CONTINUED FROM VOL. XXXIX.]

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THOMAS G. GAYLORD AND BENJAMIN B. GAYLORD, Respondents, *v.* THE LAMAR FIRE INSURANCE COMPANY, Appellant.

*Insurance—Representation—Interest—Title.*—A fire insurance policy contained a clause to the effect, "that if the interest in the property to be insured be a leasehold, trustee, mortgagee or reversionary interest, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing; otherwise the insurance shall be void." The plaintiffs insured the property as owners; their title was a purchase at a sale under the foreclosure of a mortgage in the State of Illinois, by the laws of which the mortgagor had fifteen months after sale within which to redeem; before the execution of the deed to the plaintiffs the property insured was destroyed by fire, and subsequently the plaintiffs received a deed to the property. *Held*, that the terms of the policy referred not to the nature of the title, whether legal or equitable, but to the nature of the ownership of the property; and further, that the plaintiffs having subsequently acquired the legal title by the deed, the legal title should relate back and take effect from the inception of the equitable title by the purchase at the sale under the foreclosure, so that the plaintiffs at the time the policy was issued were the owners of the property, holding the legal title in fee.

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Gaylord et al. v. Lamar Fire Ins. Co.

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*Appeal from St. Louis Circuit Court.**Sharp & Broadhead, for appellant.*

I. The property was not in fact the property of the plaintiffs; they had an interest in it, but no title to it either legal or equitable. The policy was void, because the true nature of the title was not disclosed in the policy.

In the case of *Phillips v. Demoss et als.*, 14 Ills. 410, it was held that the purchaser at a sale under the Illinois law, where there is a right of redemption, acquires no title either legal or equitable, but the right to his redemption money if redeemed by the judgment debtor within twelve, or by a judgment creditor within fifteen months; or if not so redeemed, then to the sheriff's deed.—*Sweezy v. Chandler*, 11 Ills. 445; *McZagan v. Bohn*, 11 Ills. 352.

II. Parol evidence is inadmissible to show an agreement or understanding as to the nature of the interest insured inconsistent with the terms of the written provisions of the policy.—*Jenkins v. Quincy Mut. Fire Ins. Co.*, 7 Gray, 370; *Woodbury Sav. Bk. &c. v. Charter Oak Ins. Co.*, 29 Conn. 374; *Burnet v. Union Mut. Fire Ins. Co.*, 7 Cush. (Mass.) 175; *Holmes et al. v. Charleston Mut. Fire Ins. Co.*, 10 Metc. (Mass.) 216; *N. Y. Gaslight Co. v. Mech. Fire Ins. Co. of N. Y.*, 2 Hill, 108; *Alston v. Mech. Mut. Ins. Co. of Troy*, 4 Hill, 340; 21 Conn. 37; 13 Ills. 89; *Lochner et al. v. Home Mut. Ins. Co.*, 17 Mo. 247, 256; S. C. 19 Mo. 628.

III. If a party has only a qualified interest, he can only recover the amount of it—*Niblo v. N. Amer. Ins. Co.*, 1 Sanf. 551; 2 Phil. Ins. 249.

The only interest which the plaintiffs had was an interest to the amount of their judgment, which was, as appears by the evidence, \$4,478.87. The property was insured in different companies to the amount of \$10,000. The interest insured was the amount of the judgment debt. The contract of insurance is a contract of indemnity, and not a gambling contract:

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Gaylord et al. v. Lamar Fire Ins. Co.

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$$\$10,000 : \$4,478 :: \$2,500 = \$1,119.50.$$

Eleven hundred and nineteen  $\frac{50}{100}$  dollars is all that could be recovered in any event.

*Glover & Shepley*, and *Currier*, for respondents.

I. The property was insured by Gaylord, Son & Co. as "their four-story stone and brick building." This was an assertion by the insured that they were the owners of the property. But it did not mean that they held it by a technical legal title; it did not mean necessarily that the insured had a conveyance of the perfect title at law.

If the insured were the owners of the property in so far as to have the entire beneficial interest, and in case of loss to lose the whole value of the property, then they were owners, as set forth in this policy; the property was "their" property, as stated in the policy—*Columbia Ins. Co. v. Lawrence*, 2 Pet. 46; *Tyler v. Aetna Ins. Co.*, 12 Wend. 507; *Hough v. City Fire Ins. Co.*, 29 Conn. 10.

That the insured had not, at the moment of taking out the policy, a legal conveyance of the property which they had bought, and for which they had paid in full, is immaterial.

II. The next objection made to the title of the insured is, that the sale was redeemable for twelve months as to the defendants in the chancery suit, and for fifteen months as to the creditors of Banks, Bell & Co.

We insist that there was no power of redemption in any of the defendants in the chancery suit; the twelve months from the sale had passed when the policy issued. As to the creditors, none of them redeemed in fact, and the title was not defeated; and unless there were creditors in condition to redeem, the title of the insured never could be divested, and was therefore indefeasible in fact.

III. The conduct of the defendants' company was such as to waive the conditions of the company—*Hall v. People's Mut. Fire Ins. Co.*, 6 Gray, 185; *Atlantic Ins. Co. v. Goodal*, 35 N. H. 334-5.

IV. The Lamar Insurance Company of New York is a foreign company acting here by a general agent competent to do what the company could do. The particular powers of the agent are not shown; the inference is, they were general—1 Rev. Stat. 1855, p. 884.

V. After the deed was made to Gaylord, Son & Co., it related back to the date of the sale, and must now be considered a title from the first act of its inception—*Jackson v. McCall*, 3 Cow. 80; *Jackson v. Bull*, 1 J. R. 81; *Jackson v. Diekman*, 15 J. R. 309; *Johnson v. Stagg*, 2 J. R. 507, 520; *Johnson v. Raymond*, 1 J. R. 85; *Shaw v. Cooper*, 7 Pet. 292; *Heath v. Ross*, 12 J. R. 140; *Boyd v. Longworth*, 11 Ohio, 235, 252.

HOLMES, Judge, delivered the opinion of the court.

It appears that the property insured was sold on the 2d day of August, 1862, under a decree of foreclosure of a mortgage, and that a certificate of purchase of that date was delivered by the special commissioner to the purchaser, who assigned it to the plaintiffs under the laws of Illinois, which allowed fifteen months for redemption before the final deed was to be executed; that the plaintiffs, as owners of the property, effected this insurance on the 5th day of September, 1863; that the loss occurred on the 9th day of October following, and that on the 3d day of December, 1863, the special commissioner executed and delivered to the plaintiffs, as assignees of the certificate of purchase, his final deed conveying the property in fee, no redemption having taken place.

The policy contained a clause to this effect: "that if the interest in the property to be insured be a leasehold, trustee, mortgagee, or reversionary interest, or other interest not absolute, it must be so represented to the company, and expressed in the policy in writing; otherwise the insurance shall be void."

× No written application was made before the policy was issued. The verbal representation was simply to the effect that the insured were the owners of the property. The

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Gaylord et al. v. Lamar Fire Ins. Co.

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ground of objection is, that they were not the absolute owners in fee simple title at the date of the policy or of the loss, and that there was a breach of warranty in this respect, or a misrepresentation of the interest of the insured, that, under this clause, avoided the policy.

The object and intent of this clause would seem to have been, that if the interest of the insured in the property was only that of a lessee, trustee, mortgagee, or other estate less than a freehold, or carved out of the fee simple, the same should be particularly stated and described in the policy. As to the absolute or full ownership of the property, whether it were by virtue of a legal or equitable title, it would seem to have been left to the general law on the subject of the interest of the insured. If he were the owner at the time of the loss, that would be enough; if he were not the owner, there could be no recovery on the policy. Under a somewhat similar claim, it has been held that the "*absolute interest*" referred rather to the actual ownership than to the nature of the title, and meant a vested interest of which the owner could not be deprived without his consent, "in contradistinction to a contingent or conditional interest"—*Haight v. City Fire Ins. Co.*, 29 Conn. 10. An equitable title that would be protected by a court of equity as such, may be an ownership as absolute as the legal title. The clause does not concern the particular character of the owner's title. This title was subject, it is true, to be divested by redemption under the statute, and may be said to have been so far conditional, or rather defeasible. We are inclined to think such a contingency did not come within the special intent of this clause, which rather related to lesser estates, or interests, of the class particularly enumerated; nor do we see any reason for a different construction: for if the title had failed by reason of a redemption, there could have been no recovery on the policy even without this clause; not failing, the loss would fall on the plaintiffs, and they would be justly entitled to indemnity. The indefeasibility of the title is not the criterion of an insurable interest; an expectancy coupled with a pres-

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ent existing title is enough—*Stirling v. Vaughan*, 11 East. 618; 1 *Arnold on Ins.* 230; *Hildy. Ins.* 66.)

But whatever doubt there may have been on this point, we think the whole controversy is closed by the operation of the fiction of relation, whereby, for all the purposes of this insurance, the commissioner's deed is to be considered as relating back to the date of the sale and certificate, and as vesting the full legal title in the plaintiffs as of a date anterior to the date of the policy; and that they are to be regarded as having been the absolute owners of the title at that date and at the time of the loss—*Crowley v. Wallace*, 12 Mo. 145; *Jackson v. McCall*, 3 Cow. 75; *Boyd v. Longworth*, 11 Ohio, 235. We see no reason why this principle should not be applied here. The certificate filed was equivalent to a deed taken and recorded, so far as the purchaser's security from any intervening claims; but the right of redemption was concerned, and the deed operated by way of execution of a statute power to pass the absolute title from the date of the sale by relation—4 *Kent's Com.* (7th ed.) 456-60.

It is consistent with the maxim, *ut res magis valeat quam pereat*. It is in furtherance of justice. It does not interfere with the rights of a stranger, nor injuriously affect the intervening rights of any third party. It does not take away any defence which the defendants would be entitled to make by virtue of any stipulation in the policy. The interest of the assured was not of the character of any of these lesser estates, which were required to be disclosed and particularly described in the policy. It merely avoids a technical objection to the nature of the plaintiffs' title. It is a fiction of law which may be properly applied in support of justice, and to obviate a failure of the contract on a purely technical ground.

No injustice is done to the defendants. It was not a matter of any importance to them that this title was subject to be divested by a possible redemption; for if there had been a redemption before the loss, there would have been no title, no insurable interest in the plaintiffs, and, of course, no pos-



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Kern v. South St. Louis Mut. Ins. Co.

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sible right to recover. But there was no redemption. The defeasible title became an absolute one, and by relation was fully vested before the loss, and all substantial ground of objection on the part of the defendants entirely disappears.

Judgment affirmed. The other judges concur.



JACOB KERN, Respondent, v. THE SOUTH ST. LOUIS MUTUAL  
INSURANCE COMPANY, Appellant.

1. *Evidence—Experts—Insurance.*—A witness who has been many years an officer of an insurance company, and has become acquainted with the business of fire insurance, is competent to give his opinion as to the effect produced by the erection of additions to the buildings insured.
2. *Insurance—Policy—Risk.*—When the alterations and additions to a building materially increase the risk, so that the insurer would be entitled to a higher rate of premium, the policy will be treated as absolutely void if the insured fail to give the notice required.
3. *Practice—Pleading—Exhibits.*—No reference to papers which are mere exhibits in a cause can make the contents of such papers parts of the pleading.

*Appeal from St. Louis Circuit Court.*

The plaintiff took out a policy in this case and became a member of the defendant's company on the 28th of November, 1862. The insurance effected was to the amount of five thousand dollars—twenty-five hundred on the two-story brick building, and the same sum on stock in wagonmaker's and blacksmith's shop therein, situated on the northwest corner of Third and Lombard streets in St. Louis. The property was burnt January 8, 1864. Due notice was given to defendant and proof of loss made.

The defendant set up in answer to the petition, that after the insurance, and without the knowledge or consent of defendant, the plaintiff erected a wooden building or shed next to and adjoining the brick building, and set up a steam boiler in it, and put the engine and gearing in the brick building, and ran the steam pipe through the wall, and had or made openings connecting the boiler room with the engine inside

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Kern v. South St. Louis Mut. Ins. Co.

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the building, and erected a chimney stack for the furnace close to and adjoining the building insured ; that the erection of the engine and boiler and the connection of them in that way increased the risk and hazard of fire, thereby forfeiting the policy, and that the changes thus made were such an alteration in the building as avoided the policy. There was also erected by plaintiff, after the insurance and without notice, a new brick building adjoining the one insured and connected with it, in which was stored material for making wagons.

The plaintiff put in evidence the policy, the charter and by-laws of defendant, and made proof of loss and notice. The policy refers to the act of incorporation of the company, dated March 10, 1859: it was for six years, and made the conditions of insurance, the act of incorporation, and the by-laws, a part of the policy.

The policy provided: "It is agreed by the assured, that, in case there shall be any building erected immediately adjacent or adjoining the above described building which shall materially increase the risk or hazard of fire, notice shall be given the company immediately, that an examination can be made by the agent or agents of the company, and the rate of insurance increased, or the policy cancelled, at the option of either party."

The conditions of insurance provided: "If during the insurance the risk is increased by the erection of buildings, or by the use or occupation of neighboring premises or otherwise, or if for any other cause the directors shall elect, it shall be optional with them to terminate the insurance after notice is given to the insured or representative of their intention so to do."

Another condition was: "It is further agreed, that no change of the building or buildings herein insured, or in which property is insured by this company, shall be made by repairs, additions, or otherwise, without the consent or approval of the president of the company, in writing, before making such change. Any breach or violation of this

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provision shall render this policy of no effect during such change, and until such change shall be approved by the president or directors."

It appeared in evidence that the engine had been run for the purpose of trial, and to get it in working order, before the fire, but the fire under the boiler had been put out a day or two before the fire. The fire occurred early in the morning, and was first seen in the building insured and in the yard adjoining. That about six weeks before the fire the wooden shed was erected, about twenty feet long and eight or ten feet high, adjoining on the insured buildings, and under this the boiler and furnace were put, and the engine set up inside the insured building, the steam pipes running through the wall; a gang of two saws was also under the shed, run by the engine. There was a door in the north wall of the insured building opening into the shed.

The defendant called John C. Vogel (who testified that he had been an officer of an insurance company in St. Louis for twelve years, and was familiar with insurance in mutual insurance companies and the rates of insurance) and asked him—1. "That whether in your opinion the erection of the boiler and the location of the engines in the old building, and the erection of the wooden shed over the boiler, created an additional hazard and required an additional premium to insure the old building?" This question was objected to by plaintiff and excluded by the court, and the exclusion excepted to. The question was asked simply as to whether such change would require a higher rate of premium, and that question was excluded. Also the question as to whether or not such change, in his opinion, increased the risk; and that was excluded and excepted to.

The court gave the following instructions for respondent:

1. The jury are instructed that no alteration or repairs made on premises insured by plaintiff would avoid his policy, nor can his recovery be defeated by means of alterations or repairs, unless the same were such as to increase the risk

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or hazard from fire to the insured premises. If the jury find from the evidence that defendant made the policy sued on, and the property insured was destroyed by fire as stated in petition, and plaintiff complied with the agreements and conditions in the policy to be complied with on his part, they will find for the plaintiff.

2. The jury are instructed that the policy sued on could not be made void, nor can the recovery of plaintiff be defeated by the erection of any building immediately adjacent or adjoining premises insured, unless such erections materially increased the risk or hazard of fire.

To the giving of each of said instructions appellant excepted.

Of the following instructions for appellant, the court gave the first, and refused the second and third :

1. If any alteration in the building insured was made by plaintiff, or under his direction, or with his knowledge or consent, after insurance made with defendant, whereby said building was exposed to greater risk or hazard from fire than when insured, the policy became void, unless plaintiff has proved to the satisfaction of the jury that an additional premium and deposit, after such alteration, was settled with and paid to defendant or agent before the fire happened.

2. If the jury find from the evidence that plaintiff, after obtaining the policy sued on, caused a wooden shed to be erected adjoining insured building, and an engine to be put up in it to be propelled by steam from said boiler, and said boiler was heated by a furnace under it, and said engine was connected by a steam pipe with said boiler, also by bands with machinery for propelling two saws on the outside of the insured building, and that a new brick building was erected adjoining the insured building,—then the jury are instructed that such erections, machinery and connections are an alteration of the insured building within the meaning of the 24th section of charter of defendant.

3. It is wholly immaterial in this case how or from what

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cause the fire happened that consumed the premises insured; and if the jury find from the evidence that any alteration was made in the building insured by plaintiff, or his workmen or agents, under his direction, or with his knowledge or consent, after the insurance made thereon with defendant, whereby said building was exposed to greater risk or hazard from fire than it was when insured, then the policy sued on became void and of no effect, and the jury will find a verdict for defendant, unless the plaintiff has proved to the satisfaction of the jury that an additional premium and deposit, after such alteration, was settled with and paid to the defendant.

*Hill & Jewett*, for appellant.

I. The provision against an increase of risk by act of insured in altering or adding to the building insured is not controlled or limited by the previous condition or specification or hazards, but is an independent condition of itself; and although the particular alteration, addition or change was not included in said classes of hazards, yet if it increased the risk, the policy is thereby avoided—*Bratwright v. Aetna Ins. Co.*, 1 Strobh. (S. C.) 281.

II. It is wholly immaterial whether the alteration, addition or change is made so as to increase the risk or not. The defendant has required the plaintiff by his contract to give notice of all and every alteration, addition or change in the insured premises, and obtain the approval of the president of the company in writing before the change is made; and a violation of this condition avoids the policy—*Dietz v. The Mound City Mut. Ins. Co.*, 38 Mo. 90.

III. The court below further erred in refusing to permit the questions to be put to the underwriters as experts, as to the increase of risk and increase of premium by erecting the steam saw mill on the insured premises and the wooden mill adjoining the insured building.

Underwriters are experts in such cases—*Schenck v. Mercer Co. Mut. Ins. Co.*, 4 Zab. (N. J.) 447-51; 1 Greenl. Ev.

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§ 440; Hartford Prot. Ins. Co. v. Horner, 22 Ohio, 452. The case of Webber v. Easton R.R. Co., 2 Metc. (Mass.) 147, expressly approves the doctrine of experts.

IV. In Merriam v. Middlesex Mut. Fire Ins. Co., 21 Pick. (Mass.) 162, it was held that if a higher rate of premium would have been demanded to insure the building in its altered state than would have been demanded before, then the policy is avoided.

In Bratwright v. Aetna Ins. Co., 1 Strobb. (S. C.) 281, the court held that the provision against increase of risk by any means was independent of the specifications of hazards; and although the act done was not specified in the classes of hazards, yet if it increased the risk the policy was thereby avoided.—Murdock's case, 2 Comst. (N. Y.) 210, overruling Stebbins v. Globe Ins. Co., 2 Hall, 632; Commonw. Ins. Co. v. Carney, 10 Pick. (Mass.) 535; Reed v. Gore Ins. Co., 11 Upp. Can., Q. B., 535; Gardiner v. Piscata. Mut. F. Ins. Co., 38 Me. 439; Gykes v. Perry Co. Ins. Co., 34 Penn. (1859,) p. 97; Girard Fire & Mar. Ins. Co. v. Stephenson, 37 Penn. 293; Leadbetter v. Aetna Ins. Co., 13 Me. 265; Curry v. Comm. Ins. Co., 10 Pick. 535; Stetson v. Mass. Mut. Ins. Co., 4 Mass. 330; Jones Manufacturing Co. v. Manufacturer's Mut. Ins. Co., 8 Cush. (Mass.) 82.

*Glover & Shepley*, for respondent.

The court properly overruled the questions propounded to the witness Vogel touching his opinion; the opinion was not evidence in any aspect of the case—Jefferson Ins. Co. v. Cotheal, 7 Wend. 77; Protection Ins. Co. v. Horner, 22 Ohio, 452; Fish v. Dodge, 4 Denio, 311; Joyce v. Marine Ins. Co., 45 Me. 170. The appellant now insists the policy is void under this condition.

FAGG, Judge, delivered the opinion of the court.

This case was tried in the St. Louis Circuit Court, and both parties seem to have proceeded in the trial upon the theory that the question really in issue was whether the ad-



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ditions and alterations made to the insured building by the plaintiff were such as materially to increase the risk and hazard from fire. This is a question of fact, and its determination is peculiarly within the province of the jury.

A question is presented for consideration here that was not raised in the court below, and is one that we are not authorized to pass upon. It refers to the force and effect to be given to a condition attached to the policy upon which this suit was brought, which requires a notice to be given of every change to a building insured, or in which property is insured by the company, made by repairs, additions, or otherwise. If made without the consent or approval of the president, in writing, previously obtained, the policy is to have no effect until the approval of the president or directors is secured. It is true that the plaintiff, in declaring upon the policy, refers to it as being attached to and made a part of the petition. But whatever form of words may be used in referring to papers which are to be understood as mere exhibits in the cause, they cannot in any proper sense make them parts of the pleading—*Hadwen v. Home Mut. Ins. Co.*, 13 Mo. 473; *Curry v. Lackey*, 35 Mo. 392; *Baker v. Berry*, 37 Mo. 306; *Bowling v. McFarlan*, 38 Mo. 465. It is true that the defendant sufficiently denies that the plaintiff complied with all of the conditions and stipulations in the policy, but still the point is not presented in such a manner that we can consider it here.

The policy covered a two-story brick building, situated on the northwest corner of Third and Lombard streets in the city of St. Louis, and in which there was a wagonmaker's and blacksmith's shop. The whole amount of insurance was \$5,000—\$2,500 on the building and the same amount on the stock in the shops.

It appears that the building was consumed by fire on or about the 8th day of January, 1864. The fire was first discovered about five o'clock in the morning, and was then burning in the building and in the yard adjoining. About six weeks previous to that time, the plaintiff had erected a

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steam boiler, with a furnace beneath it, of the length of twenty feet and about eight feet high, adjoining the north wall of the insured building, and that a wooden shed, about thirty-five feet long, fifteen wide, and twelve feet high, had been erected to cover the same; that a gang of two saws had been placed at the eastern end of the shed, and under it, for the purpose of sawing the timber used in the shop. The engine was placed inside of the brick building, and supplied with steam by a pipe passing through the wall.

This seems to have constituted the substance of the facts proved on the trial. The jury were left to decide the question as to the increase of risk upon the description of the alterations and additions alone.

The testimony offered on the part of the defendant ought to have been admitted. In the case of *Webber v. Eastern R.R. Co.*, 2 Metc. 147, a witness was called to give his opinion upon the question, whether the proximity of a railroad to the insured property would be likely to increase the rate of premium of insurance against fire. He did not profess to be an expert, but his means of knowledge on that subject resulted from his having been for a long time secretary of a fire insurance office, and as such "charged with the duty of examining buildings and taking into consideration all circumstances bearing upon the risk and rate of premium." The court held that these facts "rendered him competent to give his opinion as evidence to the jury upon that subject." So we think in this case that the witness John C. Vogel, after stating that he had been "an officer" in an insurance company in the city of St. Louis for twelve years past, and that he was "familiar with insurance in mutual insurance companies and the rules of insurance"—made him a competent witness to give his opinion on these subjects. It must be, to a very great extent, matter of opinion at best, and the value of opinion in such cases must greatly depend upon the experience and familiarity with the business possessed by the persons called upon to give them. Jurors cannot be presumed to be so familiar with questions of this sort as to be



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able to give their opinions correctly merely upon having a description of the premises with the alterations and additions made by the assured.

The instructions given contained correct propositions of law; and if all the competent evidence offered in the case had been permitted to go to the jury, there would have been no reasonable ground of complaint.

All the authorities, so far as they have been examined, agree in the conclusion, that when the alterations or additions materially increase the risk, so that the insurer would be entitled to a higher rate of premium, the policy is to be treated as absolutely void if the assured fails to give the notice required—*Gardiner et al. v. Piscataquis Mut. F. Ins. Co.*, 38 Me. 439; *Curry v. Commonwealth Ins. Co.*, 10 Pick. 535; *Francis v. Somerville Mut. Ins. Co.*, 1 Dutcher, 78; *Bratwright v. Aetna Ins. Co.*, 1 Strobh. 281; *Schenck v. Mercer Co. Mut. Ins. Co.*, 4 Zab. (N. J.) 447.

By its refusal to admit competent testimony, therefore, error was committed by the court; and the judgment is reversed and the cause remanded for further trial. The other judges concur.



JOSEPH K. SUMRALL, Respondent, v. SUN MUTUAL INSURANCE COMPANY, Appellant.

1. *Action—Assignment—Interest—Contract.*—The interest due and to become due by an insurance company to a subscriber to its guaranty fund is assignable, subject however to the equities existing between the parties.
2. *Corporations—Charter—Amendments—Acceptance.*—The acceptance of a charter by the corporation, and the acceptance of amendments to an existing charter, may be proved by the acts of the officers and members of the corporation, from which the fact of acceptance may be inferred.

*Appeal from St. Louis Court of Common Pleas.*

The following declarations of law were asked by defendant and refused:

1. The writing read in evidence purporting to be an assignment made by Edward Dobyns to plaintiff, dated July

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23, 1863, is not sufficient in law to vest in the plaintiff the right to claim or recover of the defendant the amount of interest sued for in this case.

2. If the court finds from the evidence that certain persons were members of the Sun Mutual Insurance Company at the time of the passage of the act of the General Assembly approved January 16, 1860, read in evidence by the plaintiff; and if the court also finds from the evidence that a large number of the same persons continued to be members of the defendant until this suit was begun, and since then, the plaintiff cannot recover in this action unless he has shown in evidence to the satisfaction of the court that the said persons, who were and who continued to be members of the defendant as aforesaid, either assented to the passage of said act, or that they accepted its provisions.

3. There is no evidence in this case to show that the persons who were members of the company at the time of the passage of the act of January 16, 1860, ever assented to the passage of said act or accepted its provisions.

4. The plaintiff cannot recover against defendant for any interest that has accrued on the \$16,500 subscription in question since the assignment was made by Dobyns to plaintiff.

The court rendered a verdict and judgment for the plaintiff for \$2,200.

*Krum & Decker*, for appellant.

I. The original shareholders of a private corporation are not bound to accept the amendments passed by the Legislature which increases their liability and divests them of rights acquired under the original compact. The charter under which they organized is a contract, and while the right of the Legislature "to repeal, alter or suspend" is not denied, yet it is denied that they can impose upon original shareholders a liability to pay \$5,000 annually to subscribers to a so called "guaranty fund," and destroy the vested rights of members by introducing into the corporation new members with one thousand votes, to overpower the others having only one vote

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each. Never having accepted or approved this amendment, the defendant and its members are not bound by it. The directors exceeded their authority, and, like other agents acting beyond the scope of their power, are individually liable—Ang. & Am. on Corp., § 31, and cases; id. § 537, and cases.

It is not denied that every charter under the 7th sec. of corporation act of 1855 is "subject to alteration, suspension, and repeal"; but there must be some limit to this power. Under this reservation, a Legislature cannot divest rights acquired even as against a public corporation (*City of St. Louis v. Russell*, 9 Mo. 512), much less against a private corporation (*Commonwealth v. Essex Co.*, 13 Gray, 239, 253). In *Sage v. Dillard*, 15 B. Mon. 340, it was held that the power to alter, suspend and repeal did not authorize the Legislature to add new members to a corporation. This amendment adds new members with one thousand votes at the mere whim of directors, and thus puts the corporation, its property and franchises, out of the original corporators.

It will be observed that the case at bar is clearly distinguishable from *Pacific R.R. v. Renshaw*, 18 Mo. 210.

II. The contract between Dobyns and the defendant under the amendment sued on was a personal one, and could not be assigned so as to relieve the assignee from the failure of Dobyns, before or after assignment, from paying assessments. Therefore the failure on the part of Dobyns to pay the assessment made in January, 1863, for \$2400, of which he had due notice and demand, was a complete bar to the action.

*Casselberry*, for respondent.

FAGG, Judge, delivered the opinion of the court.

The questions for consideration in this case all arise upon the instructions which were asked by the appellant at the trial in the court below and refused. The plaintiff below (respondent here) commenced an action in the St. Louis

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Court of Common Pleas to recover the interest alleged to be due by said company on a subscription to its guaranty fund (so called) made by one Edward Dobyns, the said interest having been assigned to the said Joseph K. Sumrall as averred in the petition. The company was chartered by an act of the Legislature approved March 14, 1859; there was no provision in this act exempting it from alteration, suspension, or repeal, in the discretion of the Legislature, as provided by the general laws concerning corporations—R. C. 1855, p. 571, § 7.

On the 16th of January, 1860, an amendatory act was approved providing for a guaranty fund of not less than twenty-five nor more than fifty thousand dollars, to be subscribed in shares of fifty dollars each. The subscribers were required to execute their notes for the amount subscribed, with security therefor, if required by the directors, and to be assessed for the payment of losses in the same manner as premium notes given to said company. In sec. 4 of this act (Sess. Acts of 1859-60, p. 167) it is expressly provided that "parties subscribing shares in such guaranty fund shall be entitled to claim of said company interest not to exceed ten per cent. per annum on the amount of their respective notes, as the directors may determine, which interest shall be payable semi-annually." The other provisions need not be referred to, as they are not essential to an understanding of the questions presented here.

The answer contains several grounds of defence, but it is only necessary to consider the two which have been relied upon here as sufficient to defeat the plaintiff's recovery.

First it is averred that Dobyns had no interest which he could transfer by assignment, and defendant in his first instruction asked the court so to declare the law. The court committed no error in refusing it. For the purpose of considering this point, it may be assumed that there had been an acceptance of the amended charter. He had made his subscription and executed his note for the same in the man-

ner required by the terms of the act. He had done all that the law imposed upon him, and the obligation of the company to pay him interest upon that amount, at such rate as the board of directors should prescribe, was full and complete. No reason is perceived why such a claim could not be transferred by assignment. It is true that the assignee must take it subject to any claim on the part of the company that would constitute a set-off against it. The existence of any such claim was a fact to be found by the court sitting as a jury. The answer sets up an unpaid assessment made by the directors on the 10th of February, 1863, amounting to the sum of \$2,475 on the subscription and note of Dobyns. This suit was instituted on the 14th of March, 1863, and the judgment was obtained on the 5th day of July, 1865. The fact that such an assessment was made seems not to have been denied, but the court disregarded it entirely in making up the amount of the verdict. By the terms of the amended charter, as well as the note of Dobyns itself, it is expressly stipulated that all sums of money paid by the subscribers to this sum upon assessments made should be repaid by the company within sixty days after payment, with ten per cent. interest thereon. So that in reality it is not to be treated as a debt due the company, but a mere obligation to lend it that amount of money, and therefore is not properly the subject of set-off.

The fourth instruction assumes that in no event was the plaintiff entitled to interest upon the subscription after the assignment of Dobyns. The proof of the assignment shows that it was expressly stated to be a transfer of all claim to the interest then due, or that should thereafter accrue, and was certainly as effective to pass the one as the other.

The second instruction assumes that all of the acts of the directors under the amendatory charter of the company were without authority of law, and should be held to be null and void, because it was not shown that there had ever been an acceptance of it by the members. The third declared

that there was no evidence of acceptance whatever, and these may properly be considered together.

Whatever may be said in reference to both of these instructions, we think they were not warranted by the testimony. This company was organized under the act passed in 1859; and the amendatory act of 1860, as shown by the testimony of the acting president at the date of the commencement of this suit, was drawn up by the attorney, and its passage by the Legislature procured upon the application of at least a portion of the directors. The board of directors authorized the opening of the books of subscription to the guaranty fund provided for by the amendment, at different times after the subscription by Dobyns made assessments thereon, and at various times by the by-laws of the company recognized this subscription by regulating the rate of interest to be paid upon the same, and the date at which the computation should commence. So that, as far as their corporation is concerned, it is completely estopped by the acts of its officers, and the acceptance of the amendment may be legitimately presumed. These corporations enter so largely into the general trade and business of the country, and are so essentially necessary to give security to the capital employed in the great variety of commercial pursuits, that their acts must, to a very great extent, carry with them the same legal presumptions that attach to the acts of individuals. It was said by Judge Story, in delivering the opinion of the court in the case of *Bank of U. S. v. Dandridge*, 12 Wheat. 64, that, "in relation to the question of acceptance of a particular charter by an existing corporation, or by corporators already in the exercise of corporate functions, *the acts of the corporate officers are admissible evidence from which the fact of acceptance may be inferred.*"

The court below, sitting as a jury, having found for the plaintiff, and judgment being entered accordingly, the same must be affirmed. The other judges concur.

EDWARD P. TESSON, Respondent, v. THE ATLANTIC MUTUAL  
INSURANCE COMPANY, Appellant.

1. *Insurance — Policy — Equity — Mistake.*—A court of equity will reform a policy or other written contract, upon parol evidence, when the agreement really made between the parties has not, through accident or mistake, been correctly incorporated into the written instrument; but both the agreement and the mistake must be made out by the clearest evidence, according to the understanding of both parties as to what the contract was intended to be. The court cannot supply an agreement that was never made.
2. *Insurance — Policy — Description — Warranty.*—If there be such a variance in the description in the policy as will amount to a breach of warranty in any material respect, the policy will be void, although the insured or his agent intended to effect an insurance on the property by whatever description might be correct. Whether the description in the policy covers or fairly describes the property intended to be insured, is a matter of fact for a jury to determine, and the terms of the policy are to be reasonably construed with reference to the whole subject matter.

*Appeal from St. Louis Court of Common Pleas.*

*Hill & Jewett*, for appellant.

I. The evidence is conclusive and overwhelming that the defendant never did agree to insure any other building than the one described in the written application and policy; and there is no testimony in this cause showing any other agreement than the one evidenced by the writings.

II. To sustain a petition in equity for the reformation of a written instrument on the ground of accident or mistake, it is essential that the error or mistake be on both sides, and that it be so must be distinctly proved—Adams' Eq. 411, s. p. 171; 1 Story's Eq. §§ 155, 157; Joynes v. Statham, 3 Atk. 388; Pitcairne v. Osbourne, 2 Ves. 377; Gillespie v. Moon, 2 John Ch. 595-7. That the mistake must be on both sides is clear; for if there be a mistake by one party only, the altered instrument is not the agreement of both parties—Adams' Eq. 411, s. p. 171; 1 Story's Eq. §§ 155-7, 160.

III. A mistake on one side may be a ground for rescinding a contract, or for refusing to enforce its specific performance; but it cannot be a ground for altering the terms of a



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contract, and creating a new contract not agreed to by both parties—Townshend v. Strangroom, 6 Ves. 328; Beaumont v. Bramley, T. & R. 41; Alexander v. Crosby, L. & G. 145; Mortimer v. Shortall, 1 Conn. & L. 417.

*Glover & Shepley*, and *Bakewell & Farish*, for respondent.

On the pleadings and evidence in the cause, the plaintiff was entitled to the relief sought—Phoenix Ins. Co. v. Gurnee, 1 Paige, 278; Franklin Fire Ins. Co. v. Hewitt et al., 3 B. Mon. 231; Roth v. City Ins. Co., 6 McLane, 324; Harris v. Columbiana Ins. Co., 18 Ohio, 116; N. Y. Ice Co. v. Northwestern Ins. Co., 23 N. Y. 357; Columbia Ins. Co. v. Lawrence, 2 Pet. 55; Malleable Iron Works v. Phoenix Ins. Co., 25 Conn. 465; Fowler v. N. York Indem. Ins. Co., 23 Barb. 43.

HOLMES, Judge, delivered the opinion of the court.

This is a petition in the nature of a bill in equity to reform a policy by correcting a mistake, alleged to have been made in the framing of the instrument, in order to make it conform to the real contract of the parties, and for relief upon the policy so reformed. The court below granted the relief prayed, and the case comes up by appeal.

It appears that the agent of the insured made a written application to the company in these words: "\$5,000 fire insurance wanted for six months on a 3 or 4 story brick distillery and machinery, not running, no fire about it, situated entirely detached (nearest building being an office, say 100 yards) on the bank of the Mackinaw river, in the town of Forneyville, Woodford county, Illinois, valued at \$32,000. Privilege of \$5,000 other insurance. Gable end is frame. December 16, 1858. Ed. P. Tesson, per L. E. Suber, attorney in fact. Brought a letter from Tesson—no plat."

The policy contained this description: "On his three or four story brick distillery building and machinery in the same, not running, no fire in or about it, situated entirely



detached on the banks of the Mackinaw river, in the town of Forneyville, Woodford county, Illinois; valued at \$32,000; other insurance on same \$5,000."

The evidence shows that the agent had, at the time of the application, no more exact information concerning the true situation and description of the buildings to be insured than that which he communicated to the company; that the company had no other knowledge of the premises than that which was communicated by the agent; that certain plats were handed to a person (by the witness stated to be the secretary) at the insurance office, soon after the application was made and before the policy was delivered, which (as stated by the secretary) never came to his knowledge, nor to that of the directors, until after the loss, and formed no part of the written application as made; and that the policy came into the hands of the assured soon after it was issued, but that no mistake had been discovered or notified to the company until after the loss. It does not appear that these plats furnished any evidence that any contract or agreement for a policy had been made and agreed on between the parties, different in its terms from that which the policy contained. So far as appears from any explicit testimony, the policy conformed in all essential particulars with the written application, except in the omission of the words "*gable end is frame.*" No stress is laid upon this difference.

The evidence further shows that the distillery, as a whole, stood detached from any other buildings of adjoining proprietors; that the main part of the building was three stories high, two stories of brick and the third story of wood; that there were boilers set in brick work outside of the building, and covered with a shed roof on posts and supported against the wall, with an engine in the cellar; and that there was a wooden addition to the main building one story (eight or nine feet) high, and some sixty feet long and thirty wide, used in connection with the distillery and as a part of it.

The plaintiff proceeds here upon the supposition that he would not be entitled to recover on the policy at law. He

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assumes that it is necessary to have the policy reformed, on the ground of a mistake made in not framing the instrument according to the agreement that was entered into between the parties, and that the contract as understood by both parties was not correctly embodied in the policy.

A court of equity has jurisdiction to reform a policy of insurance, or other written contract, upon parol evidence, when the agreement really made by both parties has not been correctly incorporated into the instrument, through accident or mistake, in the framing of it; but both the agreement and the mistake must be made out by the clearest evidence, according to the understanding of both parties, as to what the contract was intended to be, and upon testimony entirely exact and satisfactory; and it must appear that the mistake consisted in not drawing up the instrument according to the agreement that was made—*Andrews v. Essex Fire & Mar. Ins. Co.*, 2 Mason, 6; 1 Sto. Eq. Jur. §§ 157-61; *Adams' Eq.* 171; 1 Phil. Ins. 42; 1 Arnold Ins. 51; *Delaware Ins. Co. v. Hogan*, 2 Wash. C. C. 4; *Lyman v. U. S. Ins. Co.*, 2 J. Ch. 630; *Keisselbrack v. Livingston*, 4 J. Ch. 144; 1 Duer on Ins. 71. The court cannot supply an agreement that was never made—*Graves v. Boston Ins. Co.*, 2 Cran. 419.

The record here does not present such a case. There is no explicit and satisfactory evidence that any other agreement was made between the parties than that which was embodied in the policy. The policy conforms substantially to the written application upon which it was framed. It is not clearly proved that the plats ever formed a part of the application, nor does it appear that they furnish any evidence that a different contract was made. It is evident enough that the object of the agent was to get an insurance effected on this property; but he was not himself informed of its situation and character so that he could give a true and correct description. The written application was drawn up on such information as he had at the time, and the policy appears to have been framed according to the application. No other agreement was made. It is plain that if the description in

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the policy be not sufficiently correct, the reason was that the agent was not furnished with sufficient information to enable him to describe the premises more accurately. It turns out after a loss, that there was such a misdescription of the situation and character of the buildings that the plaintiff apprehends that he would fail to recover in an action of law, for the reason that the policy might not cover the subject which he intended to get insured. The company has made no other contract than that contained in the policy. If there be such a variance as would amount to a breach of warranty in any material respect, the result would simply be that the party, through a want of proper diligence and information, has failed to make an available contract of insurance—*Plahto v. Merchants' & Manuf. Ins. Co.*, 38 Mo. 248. It is not enough that the agent intended to effect an insurance on this property by whatever description might be correct—*Graves v. Boston Ins. Co.*, 2 Cranch, 419.

The case made simply presents this question: whether there was such a variance between the description of the subject insured, as contained in the policy, and the actual buildings, as shown by the evidence, as would preclude the plaintiff from recovering on the policy in an action at law? In a general sense, the buildings appear to have stood detached from other buildings of adjoining proprietors. The main building was of brick, the third story only being of wood; and there was a wooden addition used as a part of the distillery, one story high; and the boilers were set in brick outside, with a shed roof of wood. Now, whether or not this distillery building was the identical subject insured in this policy, or whether there was a misrepresentation of any material fact, or a breach of the warranty created by embodying the representations made in the policy, would be matters of fact for a jury to determine. The contract is to be construed with reference to the subject matter, and with a view to the object and intention of the parties, as the same may be gathered from the instrument. Parol evidence is admissible not to contradict or change the terms of the instrument, but to

develop and explain its true meaning. It is admissible to show the true situation and character of these buildings as the subject matter referred to in the policy, and also upon the question of a material variation between the representations made and incorporated into the policy and the actual facts as they were, and upon the matter of a material difference in the risk.

The construction of the language of the policy is to be determined, as in other contracts, by usage and common acceptance; and the stipulations, though being of a character of warranties and conditions, are to be reasonably construed with reference to the whole subject matter, and not capriciously or literally—1 Phil. Ins. §§ 766, 872.

Where a policy described the building as "*a frame house filled in with brick*," which amounted to a warranty, and the proof showed a house filled in with brick to the eaves only (the gables being wood) and only in front and rear, the two sides abutting against brick walls, it was left to the jury to say whether by the usage and custom of insurers and insured such a house answered the description in the policy—Fowler v. Aetna Fire Ins. Co., 7 Wend. 270; 1 Phil. Ins. § 873. So when the representation and the policy described the building as a "*a stone mill four stories high and covered with wood*," and the evidence showed a building of stone to the eaves only, the gables and roof being of wood, under a policy which contained a rule that the insurance should be void if the buildings were described in the policy otherwise than they really were, "so as the same be charged at a lower premium than would otherwise be demanded," it was left to the jury to decide whether the risk were materially different; and whether from all the facts given in evidence, in order to verify the description given in the policy, it was necessary that the whole walls from the foundation to the roof should be stone; and they were instructed that no variation, not fraudulently made, would vitiate the policy, unless by reason thereof the insurance was made at a lower premium than would otherwise have been demanded. The decision

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in the Supreme Court of the United States was placed on the ground that the rule had provided for the case; but the question of material difference in the risk was held to be a matter of fact for the jury to decide, and no opinion was given upon the instruction, which also left it to the jury to determine whether the property insured was truly described. In *Houghton v. Manufacturers' Mut. Ins. Co.*, 8 Metc. 120, it was held that such representations embodied in the policy partook in some measure of the character of both representations and warranties; that they need only be substantially true and correct, and that an exact and literal compliance was not required, as in other warranties; and that it was a matter of fact for the jury to decide whether such representations, incorporated into the description in the policy, were untrue in any respect material to the risk, or were substantially true and correct, and made in good faith without any intent to deceive. The rule is that in cases of express warranty it is wholly immaterial whether the matter warranted were material to the risk or not; but here the question is rather as to what was warranted. This depends partly upon the true interpretation and proper construction of the policy, and in part upon the question of fact whether the buildings were in fact, in every material respect, the same as they were described in the policy, and whether the actual warranty has been complied with or not. It becomes essentially a question whether the facts not literally embodied in the description in the policy, and so not disclosed, were material to the risk; and there can be no doubt that this is a question of fact for a jury to determine—2 Greenl. Ev. § 397; *Firemen's Ins. Co. v. Walden*, 12 J. R. 513; 1 Doug. 260; 4 Bos. & P. 151.

We do not undertake to decide whether the plaintiff would be entitled to recover at law or not. We decide only that he is not entitled to the equitable relief prayed for in his petition on the case made here.

The judgment will be reversed and the cause remanded, with leave to the plaintiff to proceed at law upon an amended petition, if he chooses to do so. The other judges concur.

WILLIAM RITTER AND JOHN MULLALY, Respondents, v. THE  
SUN MUTUAL INSURANCE COMPANY, Appellant.

*Insurance—Policy—Risk.*—The charter of an insurance company, which was printed on and made part of the policy, provided that the insurance should be void if any alteration were afterwards made in the building insured, or if any other building should be erected or placed contiguous thereto, whereby it might be exposed to greater risk or hazard than it was when insured, unless done with the consent of the directors. In a suit upon the policy, held, that the burden of proof was upon the company to show a violation of the terms of the policy; and that it was properly left to the jury to determine whether any contiguous buildings had been erected so as to increase the risk that had been taken.

*Appeal from St. Louis Circuit Court.*

*Krum & Decker*, for appellant.

*G. P. Strong* and *R. S. McDonald*, for respondents.

HOLMES, Judge, delivered the opinion of the court.

The charter under which the policy was issued contained a provision that the insurance should be void if any alteration were afterwards made in the building insured, or if any other building or thing should be "erected or placed contiguous thereto," whereby it might be exposed to greater risk or hazard than it was when insured, unless the same should be done "with the consent of the directors, and an additional premium be paid to the company on account thereof." The lot of ground on which the buildings in question were situated ran through from Sixth street to Broadway. The brick buildings insured fronted on Sixth street; the other buildings fronted on Broadway; and there was a vacant space or yard, some eight or ten feet wide, between them in the rear. At the date of the policy, the stable covered a part of the front on Broadway, and had an ell fronting on this space in the rear and crossing the whole width of the lot; and afterwards, the other part of the lot fronting on Broadway was built up and roofed over to make a part of the old stable, extending back to the ell. There was evidence bearing upon the question of fact whether the new erection were contigu-



ous and increased the risk. The instructions told the jury that the burden of proof was upon the defendant to show that this condition of the policy had been violated, and that unless they believed that the risk was increased by this erection, they would find for the plaintiff; and the plaintiff had a verdict.

This provision of the charter, which was annexed to the policy, is to be considered as much a part of the policy as if it had been distinctly referred to therein; and it was a part of the contract. But whether any contiguous building had been erected so as to increase the risk that had been taken, was a matter of fact for the jury to determine. This would seem to be clear upon all the authorities—2 Greenl. Ev. § 408; *Grant v. Harvard Ins. Co.*, 5 Hill, 10; *Murdock v. Chenango Ins. Co.*, 2 Comst. 210; *Stetson v. Mass. Mut. Ins. Co.*, 4 Mass. 330; *Merriam v. Middlesex Mut. Ins. Co.*, 21 Pick. 162; 1 Phil. Ins. § 1036. The new erection was not in fact contiguous, though in the near neighborhood. The fire could not be communicated directly from the new building, but only (as it was communicated) through the old stable as it was before. The increase of risk, if anything at all, must have been very slight, and was too far remote. We think the verdict was fully sustained by the evidence.

The instructions which were refused for the defendant, so far as they differed from those which were given for the plaintiff, were upon matters immaterial to the issue before the jury, or they were substantially contained in those that were given.

Some exceptions were taken by the defendant to the admission of testimony relating to the consent of the directors. It failed to show any such consent, and this matter was not involved in the issue of fact on which the case was submitted to the jury. We do not see that the defendant has suffered any prejudice by what was admitted, nor by the refusal of instructions.

Judgment affirmed. The other judges concur.

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Bidwell et al. v. St. Louis Floating Dock & Ins. Co.

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BIDWELL AND WALDBY, Appellants, v. THE ST. LOUIS FLOATING DOCK AND INSURANCE COMPANY, Respondent.

1. *Insurance—Policy.*—A policy was sent to the assured with a note for the premium to be signed by the assured and endorsed by a responsible endorser; it being understood that until the note was returned the policy did not take effect. *Held*, that the execution of the note was a condition precedent to the taking effect of the policy; and that the parties to whom the sum insured was payable in case of loss, could have no greater right than the party under whom they claimed.
2. *Witness—Evidence.*—The assignor of a policy of insurance is a competent witness to prove that there was no consideration for the assignment—*Perry et al. v. Siter et al.*, 37 Mo. 273.

*Appeal from St. Louis Circuit Court.*

This suit was brought by the plaintiffs, as assignees of John Scott, to recover the amount of a policy for \$2,000, issued by the defendant. The policy provided that in the event of loss the proceeds should be paid to plaintiff.

The following instructions were refused by the court in behalf of plaintiff:

1. The jury are instructed that it is totally immaterial to the merits of this controversy whether or not John Scott owes Bidwell and Waldby anything; and if they shall find from the evidence that there was a loss sustained under the policy, they are instructed that the plaintiffs, and the plaintiffs alone, can recover the same in this action.

2. If the jury find for plaintiffs, they will assess as damages the amount of the loss sustained by the boat by means of the disaster complained of (not exceeding, however, two thousand dollars), and deducting therefrom the amount due the insurance company for premium, calculate interest on the balance at six per cent. since the commencement of this suit, to wit, till the present date.

And to which refusal plaintiffs then and there duly excepted.

The following were given by the court at the instance of defendant:



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1. If from the evidence the jury find the facts to be, that the policy sued on was made by defendant's agent upon the condition that it was inoperative unless \$340 as premium money was paid or secured to be paid by negotiable note, with a solvent endorser thereon, due and payable in nine months from the date of the policy; and that such premium money has not been paid, or secured to be paid, as above stated, the law upon such facts forbids a recovery by plaintiffs.

2. If John Scott got possession of said policy, and held the same subject to the giving of a premium note therefor with a good endorser, and said policy was only delivered, or authorized to be delivered to Bidwell & Waldby on condition that they endorsed such note, and Bidwell and Waldby obtained the same contrary to such condition and without complying with it, and without the authority or sanction of the insurance company or of said Scott, and no such premium note was ever given, then the jury should find for the defendant.

3. If from the evidence the jury find that at the time said steamer sank she was in possession of Scott, the assured, and so continued until he converted her furniture, machinery, &c., to his own use or that of his creditors; and while thus in possession, defendant, by its agent, with the assent of Scott, made an effort to raise and repair said steamer, such effort and failure on the part of defendant does not constitute an abandonment on the part of Scott, or an acceptance thereof by defendant.

4. The court instructs the jury that, by the terms of the policy sued upon, it was the duty of the assured, his factor and servants, to use every practicable effort for the safeguard and recovery of said boat; and unless the jury find from the evidence that at the time and after the misfortune to said boat, the assured, his factors and servants, did use every practicable effort for the safeguard and recovery thereof, then the jury will find for the insurance company.

5. If the jury find from the evidence that at the time of

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the disaster to the "New Wm. Bell," she was not provided with a sufficiency of ropes, tackle and rigging for the safe navigation thereof; and that by the proper use of such ropes, tackle and rigging she could, after she sank, have been raised with a loss of less than two hundred and fifty dollars, then the jury will find for the insurance company.'

6. Unless the jury find from the evidence that after the misfortune happened to said boat, and at a time at least sixty days before the commencement of this suit, proof of such loss and of the interest of said Scott in and to said boat, and adjustment, were exhibited to the insurance company, then plaintiffs cannot recover herein, unless defendant in some manner waived such proof and notice.

And to which plaintiffs then and there duly excepted.

*A. J. P. Garesché*, for appellants.

*Rankin & Hayden*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action on a policy of insurance on the steamboat New Wm. Bell, by which John Scott was insured in the sum of not exceeding \$5,000; loss, if any, payable to Bidwell and Waldby, the appellants. The respondent in its answer alleged several breaches of the conditions of the policy, and also stated that Scott obtained possession of the policy of insurance on the terms and agreement that he would make and deliver to respondent his negotiable note, with the name of a solvent endorser thereon, at nine months, for the sum of \$340, being the premium for said insurance at the rate of seventeen per centum on \$2,000, and that the said policy was not to be valid or binding until the said condition and agreement were complied with. It is further stated that the said Scott violated said agreement; that he failed, neglected and refused to deliver his note endorsed as aforesaid, and failed to pay or secure the premium, or any consideration, for the said policy of insurance. Respondent therefore says it never received any consideration for the

policy ; that it never insured Scott in the sum of two thousand dollars on the steamboat New Wm. Bell, and that it never delivered the said policy to the appellants.

Respondent, before filing its answer, petitioned the court to compel Scott to appear and interplead, stating that he claimed that the policy belonged to him. The court made the order, and Scott entered his appearance and filed his interpleader, in which he stated, that it was true as averred in the answer that the policy was issued in the manner therein stated, payable to the appellants ; but he said that appellants gave no consideration therefor, and were not entitled to the possession thereof nor to any damages thereon, and asked the court to make an order that the policy might be delivered up and assigned to him.

Upon the trial the respondent introduced Scott as a witness, against the objection of appellants' counsel, who testified, among other things, that at the time the policy was signed by the respondent he resided in St. Paul, in the State of Minnesota ; that he wrote from there to his agent in St. Louis to have a policy taken on his boat for \$2,000 risk ; his instructions to his agent were to have the proceeds of the risk made payable to the appellants, in order that he might obtain their endorsement on the premium note to the insurance company ; he knew at the time that the regulations of the company required such endorsed note before it would issue the policy ; he had been a director and was familiar with its way of doing business. At St. Paul he received a letter from his agent enclosing the policy and premium note, names of maker and payee in blank ; he signed the note as maker, and gave the two papers (policy and note) to his clerk and requested him to take them to appellants, and if they filled the notes with their names as payees and endorsed the same, to deliver the policy to them and return the note, otherwise to retain both of the papers. Appellants refused to endorse the premium note, and kept both papers. That at the time he did not owe them anything ; that the policy was never assigned by him to them,

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and that they never paid him any consideration therefor; that the policy was taken out by his agent on condition that he executed and delivered to the company a negotiable note with a good endorser, which was never done.

Felters, the secretary of the insurance company, swore to substantially the same facts as to the terms and conditions on which the policy was issued, and that no note had ever been executed and delivered. The verdict and judgment were for the respondent.

It is now insisted by the counsel for the appellants, that the delivery of the policy by Scott to the appellants operated as an assignment to them, and that Scott was an incompetent witness, and they were entitled to recover. If the policy had been valid and regular, and was deposited to secure a debt owing by the assured, it would undoubtedly have had the effect to create a lien in their favor; for, where the assured deposits a policy of insurance as security for a debt, it gives the creditor a lien on the proceeds of the policy, which is binding upon the underwriters and upon the assured, and upon all those who claim an interest with notice of such lien—*Ellis v. Kreutsinger*, 27 Mo. 311; 1 Phil. on Ins. § 98; 2 Duer on Ins. § 36;—and this would be so, although the policy contained a clause prohibiting an assignment without the consent in writing of the company. And a policy like the one in this case, insuring a certain person and making the loss, if any, payable to another person, may be regarded as having been assigned, at its inception, with the assent of the company—*Nat. Fire Ins. Co. v. Crane*, 16 Md. 260; *Brown v. Roger Wms. Ins. Co.*, 5 R. I. 394; but the assignee in such case can have no greater or superior rights than the assured.

In the case of *Wallingford v. Home Mut. &c. Ins. Co.*, 30 Mo. 46, the charter of the insurance company declared that the applicant for insurance should, before he received his policy, deposit his promissory note, &c.; a part, not exceeding ten per cent., of which should be immediately paid. The by-laws provided that policies should take effect at 12 o'clock,

noon, on the day of approval at the office of the company, and should be binding thereafter, provided the premium or ten per cent. tax on the premium note had been paid, and that ten per cent. of the premium note should be paid in all cases and endorsed on the policy. It was held that the giving of the note and the payment of the prescribed ten per cent. were conditions precedent to the taking effect of the policy.

So in the case of *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391, the action was upon a policy whereby the defendant did "insure Eugene W. McCarty against loss or damage by fire, to the amount of \$7,000, on his brick dwelling-house, &c., until November 14, 1854. Loss, if any, payable to Seth Grosvenor, mortgagee." The policy contained a condition that in case of any transfer, or termination of the interest of the assured in the property insured on in the policy, either by sale or otherwise, without the consent of the company manifested in writing, the policy should from thenceforth be void. Previous to the destruction of the property by fire, McCarty, the person named in the policy as the assured, sold and conveyed the property. The Court of Appeals decided that as the policy named the owner of the property as the person insured, and declared the damages in case of loss to be payable to another person therein named as mortgagee, the latter could not recover in case of a breach of the conditions of the policy by the mortgagor.

In the case here the policy was issued on the express condition that the insured should execute his negotiable note to the company with a solvent endorser; the condition was never complied with, and the policy therefore never had any binding effect. Scott, by his failure and neglect to execute his part of the contract, by non-complying with the conditions, lost all benefit in the policy, and the right of the appellants being wholly derivative, cannot exceed the right of the party under whom they claim—*Grosvenor v. Ins. Co.*, 17 N. Y., *supra*; *Carpenter v. Providence Ins. Co.*, 16 Pet. 495; *Foster v. Equitable Fire Ins. Co.*, 2 Gray, 216.

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The court committed no error in allowing Scott to testify. He was not disqualified by the statute, and his evidence was clearly admissible within the principle laid down in this court in *Perry et al. v. Siter et al.*, 37 Mo. 273.

We see no merits exhibited in the motion for a new trial. It is difficult to perceive how the evidence could have worked a surprise on the party, as it was incontestably legitimate under the pleadings. If the amended answer was filed but a brief time before the trial, and the appellants' counsel was unable to meet the issues presented without rebutting testimony, and the time was too short to procure it, he should have moved the court for a continuance. There is nothing in the affidavits justifying our interference. Certain facts are deposed to on one side, and positively denied on the other; such being the case, we cannot overrule the discretion of the lower court.

From the view of the case we have have taken, there is nothing exceptionable in the instructions. Wherefore the judgment is affirmed. The other judges concur.



ELIJAH LIVERMORE, Respondent, v. JAMES H. BLOOD AND  
GEORGE W. BLOOD, Appellants.

*Bills and Notes — Equities — Notice — Agency.* — A party acquiring a note through an agent after its maturity, takes it subject to the equities then existing between the parties; and the principal is affected with notice of all the facts made known to his agent in the transaction.

*Appeal from St. Louis Circuit Court.*

The facts sufficiently appear in the opinion. The following instructions were asked by defendants and were refused by the court:

1. If the court sitting as a jury shall believe from the evidence that the witness Emery Livermore, at the time of the making of the notes sued on, was, and has since continued to be, the agent of the plaintiff in the transaction of his



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(plaintiff's) business in the city of St. Louis, and that said notes were made and delivered to the firm of Livermore, Sweet & Co.; that said Emery was a member of said firm; that said notes were to be held by said firm as collaterals to secure the payment of advances which might be made by them to Mowry; that said notes were sold by said Emery to the witness Thornburgh; that said Thornburgh retained the said notes in his possession and as his property until they became due; that notice of demand, refusal to pay, and protest of said notes, was waived; that sometime after they became due they were paid by said Emery, or, as the agent of plaintiff, Emery paid them with his (plaintiff's) money; that at the time he so paid them and delivered them to plaintiff he had full knowledge of the whole transaction with which said notes were connected, and the agreement between his firm and Mowry as to the use which was to be made of said notes; that at the time he so paid the said notes he knew there was an unsettled account between the said firm of Livermore, Sweet & Co. and said Mowry growing out of the same transaction with which said notes were connected, he was guilty of a fraud upon the defendants, and the plaintiff ought to be bound by the fraudulent act of his agent in that behalf.

2. And if the court shall further find from the evidence that there is a balance due from Livermore, Sweet & Co. to Mowry, the same ought to be allowed as a counter-claim against said notes.

3. The pleadings show that plaintiff took the notes sued on subject to the equities between the original parties.

4. If the court believe from the evidence that Emery Livermore procured said notes as plaintiff's agent, then whatever knowledge said Emery may have had of the circumstances under which said notes were given and held, and of the set-offs and defences against the same of the maker, will be taken to be the knowledge of the plaintiff; and if said notes were delivered to said Emery as a member of Livermore, Sweet & Co. as collaterals to secure said firm in any advances made

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or to be made by them in the purchase of castor beans for Mowry, and if said Mowry delivered to said firm castor oil, the value of which constituted an offset against the firm before said notes came into plaintiff's possession, then plaintiff can recover in this suit no more than whatever balance there may be against Mowry after deducting from the amount of advances made the value of the castor oil so delivered or sold to said firm; and if the evidence shows no such balance, then judgment should be given in favor of defendants Blood.

These instructions were all refused by the court, and judgment was given for the plaintiff.

*Woerner & Kehr*, for appellants.

Plaintiff admits in his reply that he received the notes after maturity. This, under a decision of this court in the case of *Chappel v. Allen et al.*, 38 Mo. 213, was sufficient not only to put the plaintiff upon inquiry, but to subject the notes in his hands to all the equities and defences against them.—*Bai. on Bills*, 133; *Sto. on Bills*, § 220; *Chit. on Bills*, 125; *Smith's Merc. L.* 322. But the evidence also discloses that plaintiff came into possession of the notes through an agent and that this agent was Emery Livermore, and that Emery Livermore was plaintiff's agent during all of the time that the firm of Livermore, Sweet & Co. had the transactions with Mowry touching the notes; that most of these transactions were conducted by and with Emery Livermore as the leading member of said firm. This puts the plaintiff in the position of having had direct actual knowledge of all the circumstances connected with said notes; "for notice to the agent is considered in law notice to the principal, who is taken to know everything about a transaction that his agent in it knows"—*Smith's Merc. L.* 176; *Willis v. Bk. of England*, 4 Ad. & El. 21; *Sto. on Ag.* § 451, p. 562; *Pal. on Ag.* § 2, p. 262; *Mechanics' Bk. v. Schaumburg et al.*, 38 Mo. 228.

*Voorhis and Mason*, for respondent.



HOLMES, Judge, delivered the opinion of the court.

The defendants were sued as endorsers upon certain notes of which plaintiff claims to be the holder as a purchaser for value. There was evidence on their part tending strongly to show that the notes had been endorsed for accommodation of the maker, and delivered to the firm of Livermore, Sweet & Co., to be held by them as collateral security to cover advances to be made by them on castor oil, to be delivered to them for sale on account of the maker. There was distinct proof of this arrangement. A member of this firm was called on behalf of the defendants, and stated, on cross-examination, that the notes were not deposited as collateral security, but left with his firm to be negotiated for the purpose of raising money to be advanced by them for the use of the maker in the purchase of castor beans for his manufactory; that the firm had sold the notes before due for this purpose, and that when the notes became due, protest and notice being waived by consent of the parties, he had taken them up with money of the plaintiff, for whom he was acting as agent. So far as his firm was concerned, these statements were not necessarily inconsistent with the fact, which was admitted in writing in an account rendered by the firm, that they held these notes as collateral merely; for whether they advanced their own moneys, or the money raised by a negotiation of these notes, they are still to be considered as having advanced the money to the maker under the arrangement made. There was evidence that oil had been delivered to them for sale, in pursuance of the agreement, to an amount sufficient to cover the whole or the greater part of the sums advanced, and that no account had been rendered. This member of the firm, who was also the agent of the plaintiff in this transaction, appears to have known all the facts at the time when he took up the notes, or bought them (as he says) with money belonging to the plaintiff after they became due. In taking up the notes, he did no more than he was bound to do, as a member of the firm, under an arrangement with the maker. The notes do not appear to have been

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assigned by endorsement to the plaintiff. The petition alleges only that the plaintiff became the owner. If this member of the firm, being himself insolvent, could sell these notes to the plaintiff in this manner, so as to enable him to recover against the defendants and the maker, he would clearly accomplish a fraud upon them. If he applied the money of his principal to take up notes which he was himself liable to pay as a member of the firm, with a full knowledge of all the facts, he may be reponsible to him for such a misapplication of his funds. But the principal is affected with notice of all the facts known to his agent in the transaction, and he must be considered as having taken the notes after due, subject to the equities existing between the parties and the firm of which his agent was a member—Sto. on Notes, § 178; Sto. on Ag. §§ 140 & 451.

We think the defence, if established, would be good against the plaintiff; and the defendants' instructions should have been given.

Judgment reversed and the cause remanded. The other judges concur.



AGNES PAULETTE, Plaintiff in Error, v. JAMES G. BROWN,  
Defendant in Error.

1. *Bills and Notes—Endorsements—Title.*—A party taking from the agent of the payee a note endorsed in blank, before maturity, in good faith, as a collateral security for debt of a third party, is not affected by the fraud of the agent in disposing of the note.
2. *Evidence—Witness—Practice—Contradiction.*—It is proper to instruct a jury, that if a witness has wilfully and knowingly sworn falsely to any material matter in the case, then the jury are authorized to discredit the whole of the testimony of said witness.

*Error to St. Louis Circuit Court.*

*Garesché and Mead*, for plaintiff in error.

I. The instruction in regard to the witness Tallis, at instance of defendant, should have been refused; because such instructions are improper.

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The old decisions would sustain it—State v. Mix, 15 Mo. 153; Gillett v. Wimer, 23 Mo. 79, and State v. Dwier, 25 Mo. 554. But later authorities repudiate them—State v. Cushing, 29 Mo. 217, where the court declares such an instruction to be an invasion of the province of a jury; and State v. Stout, 31 Mo. 406, where such instructions are regarded as unusual; and Blanchard v. Pratte, 37 Ills. 246, where perhaps the correct rule is to be found.

II. The test whether the transaction is usurious because a loan and not a purchase, is, could the endorser in a suit against the maker have recovered? If a mere accommodation endorsement, he could not for want of consideration; and therefore, in such a case, the transaction is a loan, and, if for excessive interest, usurious. Hence, as Wimer's endorsement was for accommodation, it was not a purchase from him by the defendant, but a loan by the latter to Castello.—Jones v. Hake, 2 John's Cas. 60; Wilkie v. Rosevelt, 3 id. 66; Marvin v. McCullum, 20 J. R. 288; Corcoran et al. v. Powers et al., 6 Ohio (N. S.) 19, and distinctions drawn between business and accommodation paper, Clark v. Sisson, 4 Duer, 408.

III. Because defendant's loan to Castello was usurious, plaintiff should recover.

*Cline & Jamison*, and *Comfort*, for defendant in error.

I. The fact that the notes in controversy were taken by the defendant as collateral security can, under the circumstances, subject him to no equities that may exist in favor of the plaintiff as to parties taking with notice of the facts.

The jury have found the fact to be, under the second instruction given for the plaintiff (appellant), that "the endorsements on the two notes sued for, and the circumstances under which they were pledged, were not sufficient to put a man of ordinary prudence on his guard, or to cause him to institute inquiries as to whether the party pledging the notes had the right and authority to pledge said notes." For the law is well settled that a party who takes a negotiable prom-

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issory note before maturity, without notice of any facts which impeach its validity as between the antecedent parties, as a collateral security for an antecedent debt, even if there is no new consideration at the time of taking such security, is a holder for a valuable consideration, and will not be affected by any equities between the original parties. This doctrine is fully borne out by the following authorities: *Bosanquet v. Dudman*, 1 Stark. 1 (1814); *Ex parte Bloxham*, 8 Ves. Ch. p. 53 (1803); *Heywood v. Matson*, 4 Bingh. 499 (1828); *Percival v. Frampton*, 2 Crompt. Mees. & Ros. 183 (1835); *Poirier v. Morris*, 20 Eng. L. & Eq. 113 (1853); *Smith's Merc. L.* 320, note; *Swift v. Tyson*, 16 Pet. 19-22 (1842); *Pugh v. Durfee*, 1 Blackf. 414 (1849); *Goodman v. Simonds*, 20 How. 370 (1857); *Chickopee Bk. v. Chapin*, 8 Metc. 43-4 (1844); *Blanchard v. Stevens*, 3 Cush. 168 (1849); *Atchinson v. Brooks*, 26 Vt. 575 (1854); *Allain v. Hartshorn*, 1 Zab. (N. J.) 667 (1847); *Carlisle v. Wishart*, 11 Ohio, 191-2 (1842); *Vallette v. Mason*, 1 Smith (Ind.) 89 (1849); *Greeneaux v. Wheeler*, 6 Texas, 527 (1851); *Robinson v. Smith*, 14 Cal. 98 (1859); *Grant v. Kidwell*, 30 Mo. 455; *Story on Bills*, § 192; 3 Kent's Com. 8, note 31, ed. 1848.

It will thus be seen that the principle of law above contended for is established in England, in the Supreme Court of the United States, in Vermont, Massachusetts, New Jersey, Ohio, Indiana, Texas and California, and that it has the high sanction of Lord Mansfield, of Story, and of Kent.

The fact that the notes in controversy were endorsed by Thomas Tallis as "curator" does not subject them in the hands of the holder to any equities existing between antecedent parties. The notes in question belonged, it is alleged, at the time they were negotiated, to the plaintiff. Now the fact is that Tallis was not curator of the plaintiff, nor in fact did he hold any fiduciary relationship to her; but he was curator of her children, who had no interest in the notes.—*Powell v. Morrison*, 35 Mo. 244; *Jeffries v. McLean*, 12 Mo. 538; *Thornton v. Rankin*, 5 Mart. La. (N. S.) 703.

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II. There was no error in the first instruction given for the defendant, to the effect that the jury, if they found that Thomas Tallis wilfully and knowingly swore falsely to any material matter in the case, then they were authorized to discredit the whole of his testimony. "If a witness wilfully testifies falsely to any material fact in the case, the jury are authorized to discredit and reject the whole of his testimony."—*State v. Mix*, 15 Mo. 153; *Gillett v. Wimer*, 23 Mo. 77. *State v. Cushing*, 29 Mo. 217, and *State v. Stout*, 31 Mo. 406, quoted by the appellant as being adverse, are both cases in which the jury were directed (not authorized) to disregard the whole of the testimony of the witness.

FAGG, Judge, delivered the opinion of the court.

This case is here upon a writ of error to the Circuit Court of St. Louis county. The suit was instituted under the provisions of the statute in relation to the claim and delivery of personal property.

Two negotiable promissory notes, each for the sum of \$1,050, executed by one Tesson, and made payable to the order of the plaintiff, were the articles of property sued for. They were alleged to be in the possession of the defendant, and by him wrongfully withheld from the plaintiff. She states in her petition that "one James Castello, without her knowledge, consent or authority, placed the same in the hands of defendant as collateral security for the payment of a certain note of said Castello, dated April 28, 1860, payable six months after date to the order of John M. Wimer, for eighteen hundred and seventy-five dollars." It was further averred that "said notes had not been traded, sold or negotiated to or with any one, but that they had been placed by plaintiff in the hands of her friend Thomas Tallis for safe keeping merely, and that if he or any one else had allowed said Castello to have or receive them, it was without her knowledge or consent." Judgment was then asked for the recovery of the property and for damages. The allegations as to the ownership of the notes, as well as their wrongful

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detention by the defendant were specifically denied. The answer sets out at length the facts and circumstances connected with the defendant's possession of the property, and claims that he was rightfully the holder of the same by means of a transfer taken in good faith and for a valuable consideration. The case was tried by a jury and resulted in a verdict for the defendant. The real question for the consideration of the jury was simple in its character, and as no objections were made at the trial as to the admissibility of testimony, the only questions for our consideration here relate to the declarations of law which were given and refused by the court. It appears that the note of Castello, drawn in favor of Wimer and by him endorsed, was negotiated through the agency of one Hunt, a note broker, and one Thomas Tallis, mentioned in the petition as the person with whom the notes in controversy had been deposited for safe keeping. They were endorsed in blank by plaintiff, and at the time of transfer to the defendant were also endorsed by the said Tallis, who attached to his name the word "curator."

Much importance seems to have been attached to this fact at the trial as being sufficient of itself to put the defendant upon his inquiry as to the power and authority of Tallis to transfer them by endorsement. It was not pretended at all that the defendant had obtained possession of the notes by fraudulent means, or that he had knowledge of the fact that they were really the property of the plaintiff, and that the transfer was against her knowledge and consent; but the right to recover seems to have been based mainly upon the ground that the circumstances attending the endorsement by Tallis were sufficient to affect the defendant with notice of the fact of his want of authority to make the transfer, or at least to put him upon his inquiry, and all of the instructions asked by plaintiff, with perhaps one exception, were directed to that one point alone. It is sufficient to say of the instructions given at the instance of plaintiff that they presented the law in a light most favorable to her. Those refused were



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all, with one exception, to the same effect substantially, and differing only as to form. This question having been thus fairly presented to the jury, the verdict must be taken to be conclusive on that point. The instruction asked by the plaintiff in reference to the character of the contract between Castello and Brown in the purchase of the note mentioned, was properly refused. Whether that contract was usurious or not, can in no sense affect the controversy between these parties.

The only remaining point to be considered is the propriety of the following instruction given at the instance of the defendant: "If the jury find that Thomas Tallis wilfully and knowingly swore falsely to any material matter in this case, the jury are authorized to discredit the whole of the testimony of said Tallis." The giving of this instruction seems to be relied upon as the chief ground of reversal, and therefore demands a more extended notice than any other point raised in the case.

It is contended here that the rulings of this court upon this point, in the cases in which it has heretofore arisen, are somewhat conflicting, and it is therefore considered necessary to review the opinions in those cases for the purpose of ascertaining whether there is such a conflict, and if so, to lay down a rule now which shall conform as near as may be to the more modern opinions upon this subject.

In the case of the State v. Mix, 15 Mo. 153, such an instruction was held to be proper, without the assignment of any reason for the ruling. In the case of Gillett v. Wimer, 23 Mo. 77, the same question was before the court, and Judge Ryland, in delivering the opinion of the court, cited the case of the State v. Mix, and said that the decision in that case was considered to be "declaratory of principles well established."

The case of the Santísima Trinidad, 7 Wheat. 283, was also cited, and the opinion of Judge Story quoted at length in the application of the maxim *falsus in uno, falsus in omnibus*.

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The very point discussed in this quotation was as to a modification of this rule.

It had been contended, as it is here, that the rule was too broadly stated, and that if the testimony of the witness as to other material facts in the case is corroborated by other evidence it would be improper to exclude that portion, although it might be shown to be false as to another fact. The learned judge said, "that position may be true under circumstances; but it is a doctrine which can be received only under many qualifications and with great caution."

In the case of the State v. Dwier, 25 Mo. 553, an instruction had been refused almost identical in language with the one under consideration, and substantially the same with those passed upon in the cases heretofore referred to. Judge Richardson, in delivering the opinion of the court, said:—"When a witness is contradicted in a material fact, it is for the jury to pass on his credibility; and the party against whom the evidence is given *is entitled to the declaration of law from the court contained in the refused instruction.*" It is a fact worthy of notice that Judge Richardson would have gone a step farther in that case if he had not been restrained by a majority of the court. He says: "In my opinion, if the jury believe that a witness has wilfully testified falsely in respect to any material fact, *it is their duty to disregard the whole of his testimony, and they should be so instructed by the court*; but the other members of this court think that the jury ought only to be told that they *may* do what I think they are *bound* to do."

In the case of the State v. Cushing, 29 Mo. 215, Judge Napton, in commenting upon an instruction which is not set out in full either in the statement of the case or the opinion of the court, after declaring that it was properly refused by the Circuit Court, proceeds to say that it was "an instruction directing the jury to disregard the entire evidence of a witness if they believe him false in any particular. Such instructions invade the province of the jury, whose business



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it is to determine the credibility of witnesses, and who are not to be hampered in exercising their judgment by any inflexible rules on the subject." No allusion whatever is made in this opinion to the former decisions of the court upon that question, and nothing from which even an inference can be drawn that the point then under consideration was the same that had been passed upon in the former decisions. We cannot believe from the general statement of the substance of the instruction, and the language of Judge Napton, that there was any intention of overruling the former cases, and therefore conclude that the question before the court was not considered to be the same. In the case of the State v. Stout, 31 Mo. 406, as we understand the opinion of the court, the judgment of the court below was reversed, not alone because an instruction similar to the one under consideration had been given, but because that, taken in connection with another asked by the defendant and refused by the court, in the language of Judge Napton, "had a tendency to withdraw from the jury altogether the question of self-defence." It is true that he says further, "it is not usual for a court to point out a particular witness, and tell the jury to disregard his testimony if they think he has testified falsely in any material particular"; but this must only be taken in connection with what immediately follows as a part of the same sentence: "and when this is done, and all instructions upon the defence which this witness' testimony tends to establish are refused, the jury must understand the court to be of opinion that no case of self-defence is made out; *in other words, that the testimony of the suspected witness is entirely unworthy of credit.*" It is very clear that if a case should be so presented to the jury, by the declarations of law given by the court, as to interfere with the acknowledged province of the jury in passing upon the credibility of witnesses, that it would be erroneous. Such seems to have been the conclusions of the court upon an examination of the whole record in the case last cited, and we are therefore of the opinion that it was not

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intended in that case to declare a rule inconsistent with the one established in the former adjudications of this question.

The case of *Blanchard et al. v. Pratt*, 37 Ills. 243, is relied upon by the counsel for plaintiff in error as containing the true statement of the rule of evidence in this case. The question in that case is almost precisely similar to the one under consideration, and the judge, in delivering the opinion of the court, holds this language in reference to the giving of such an instruction: "We do not understand this to be the rule of evidence, laid down, as it is, so unqualifiedly. A witness may swear falsely as to one important fact, but in regard to other facts he may be corroborated by the testimony of other witnesses. In such case the jury would not be justified in discarding his whole testimony; therefore the court should have added the words, "unless corroborated." With all proper respect for this authority, it is difficult to perceive how the addition of these words could really change the meaning and effect of the instruction as it would stand without them. It is drawn upon the assumption that it is exclusively the province of the jury to pass upon the credibility of the witness, and simply directs them, in determining that matter, to take into consideration the fact (if proved to their satisfaction) of the falsehood of the witness as to any material matter. This may, according to the facts and circumstances of the case, extend to the exclusion of the whole testimony, if unsupported by other sufficient evidence, or to any portion of it that may stand uncorroborated. In other words, there is no invasion of the province of the jury, and nothing appears upon the face of such a declaration that could lead a rational mind to suppose that it was intended as a positive command to the jury to disregard it.

We conclude, therefore, that the rule was correctly stated, and that the court committed no error, and the judgment must be affirmed. The other judges concur.

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Bauer et ux. v. Bauer.

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JACOB BAUER AND CATHERINE BAUER, Defendants in Error, v.  
IGNATZ BAUER, Plaintiff in Error.

1. *Husband and Wife — Bills and Notes — Separate Estate.*—A note executed by a married woman is, as a contract, void, and she cannot be made personally liable therefor. The holding of land in fee by a married woman does not create a separate estate so as to make her liable upon a note signed by her.
2. *Justices' Courts — Filing Transcripts — Practice.*—When the transcript of a justice's judgment is filed in the office of the clerk of the Circuit Court, the court acquires jurisdiction of the case, and may, on cause shown, set aside or modify the judgment—R. C. 1855, p. 961, § 19.

*Error to St. Louis Land Court.*

*L. Gottschalk*, for plaintiff in error.

A promissory note executed by a married woman is not void, and she may be sued on such note—*Claffin v. Van Wagoner*, 32 Mo. 252. The justice had jurisdiction—R. C. 1855, p. 925, § 3.

This has been repeatedly decided by the courts. In *Barton v. Beers*, 21 How. Pr. 309, it is said: "Indeed, the capacity conferred upon her to contract liabilities, and incur debts, creates the necessity of a corresponding liability to action; for the evil would be greater, than it otherwise would be, if she can impose upon the public, by making contracts, for which neither she nor her husband is liable. If she acts as a femme sole, she ought in justice to the public to be subjected to all the duties and liabilities of a femme sole."

The court will observe that this was an action brought before a justice of the peace, and brought before the passage of the act of 1862 in New York (Laws, ch. 172, § 7), which declares that a married woman may be sued in any courts of the State.

The cases of *Coon v. Brook*, 21 Barb. 546, and *Dickermann v. Abrahams*, 21 Barb. 551, to which reference probably will be made by respondent, and which decide this principle adversely, have been expressly overruled by later decisions—25 How. Pr. 483, reversing S. C. in 28 Barb. 436; *Goulding*

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v. Davidson, 12 E. P. Smith, 604; Barton v. Beers, 21 How. Pr. 309; Klen v. Gibney, 24 How. Pr. 31, which approves of the case in 21 How.

*Taussig & Kellogg*, for defendants in error.

I. A promissory note made by a married woman cannot be enforced at law—Chit. on Bills, 20-24; Sto. on Prom. N. 85; Reeves Dom. Rel. 260-70; Roach v. Randall, 45 Me. 438; Howe v. Wilde, 34 Me. 566; Whiteside, v. Connor, 23 Mo. 461.

II. A note or bill drawn or endorsed by a married woman is void—3 Espinasse, 266; 8 Term, 545; 2 H. Black. 1077; 3 Willes, 5; 1 Strange, 516; 1 East, 432; Chouteau v. Merry, 3 Mo. 182.

III. Equity relieves solely on the ground that the contract of the wife does not create a personal obligation, and consequently the creditor would be without remedy at law—2 Sto. Eq. 268; id. 627, § 1399; Claflin v. Van Wagoner, 252; Bretton v. Wilder, 6 Hill, 242; Dorrance v. Scott, 3 Whar. 309.

Independently of this, we say that by the statutes of Missouri in force (during the pendency of the proceedings in the court below) the Land Court of St. Louis county had the exclusive jurisdiction of cases of this nature—§ 2 of an Act establishing Land Court, R. C. 1855, p. 961, §§ 16 & 17;—and the judgment of the Land Court in setting aside the judgment of the justice, and in recalling the execution, was not only legal but final.

HOLMES, Judge, delivered the opinion of the court.

It appears that an execution had been issued from the clerk's office of the St. Louis Land Court upon a transcript of a judgment before a justice of the peace, filed therein, and that upon motion the Land Court recalled the execution and set aside the judgment of the justice. It further appears by the bill of exceptions that this judgment was rendered against Catherine Bauer, in a suit by Ignatz Bauer against Jacob

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Bauer and Catherine his wife, upon a note executed by her while a married woman, and that she was "possessed in her own right in fee" of certain land described. It seems to have been supposed that this gave her a separate estate in respect of this property, and that her note was valid as made in respect of her separate estate. This was altogether a mistake; no separate estate was thereby created. Her note was void for want of capacity to make it. The judgment was irregular, if not absolutely void.

The statute provides that such judgments, from the time of filing the transcript, "shall be under the control of the court where the transcript is filed; may be revived and carried into effect in the same manner, and with like effect, as judgments of Circuit Courts"—R. C. 1855, p. 961, § 19. We think the Land Court had jurisdiction not only to recall the execution, but to set aside the judgment, and that the action of the court upon the motion was entirely correct and proper.

Judgment affirmed; the other judges concur.



WILLIAM P. FENN, Appellant, v. JOSEPH DUGDALE, ADM'R,  
Respondent.

*Bills and Notes—Endorsers.*—An endorser for the accommodation of the maker, upon paying the amount due upon the note to the holder, re-acquires title and may sue the maker—S. C. 31 Mo. 580.

*Appeal from St. Louis Circuit Court.*

*Cline & Jamison*, for appellant.

*Garesché*, for respondent.

FAGG, Judge, delivered the opinion of the court.

This was a proceeding instituted originally in the Probate Court of St. Louis county upon an account presented by the appellant Fenn against the estate of Francis Dugdale, deceased, for money paid to the use of decedent, upon a note executed by Dugdale and upon which plaintiff was alleged

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to be an accommodation endorser. The note had been negotiated at the banking-house of Lucas, Simonds & Co., and after maturity a judgment had been obtained against Fenn, which was fully paid off and discharged by him. The amount of the judgment with interest thereon, together with the costs of suit, was the amount of the allowance asked for. The demand being allowed, an appeal was taken to the Circuit Court of St. Louis county, where plaintiff recovered the amount of the judgment and interest but not the costs. Upon an appeal taken to this court and determined at the March term, 1862, the judgment was reversed and the cause remanded, with leave to the plaintiff Fenn to amend his notice of demand so as to show that the same was founded upon the note in question which he had re-acquired of Lucas, Simonds & Co., and of which he was then the legal holder. The amendment was made in conformity with the opinion of the court (31 Mo. 580), and a trial had, which resulted in a verdict and judgment for the defendant, and the case is here upon an appeal taken by the plaintiff. There was a manifest misdirection of the jury by the instructions of the court. There were only two witnesses examined. The first was introduced upon the part of the plaintiff to prove that the note sued upon was executed by Francis Dugdale, deceased, and that the plaintiff and witness were mere accommodation endorsers; that it had been negotiated for the exclusive benefit of Dugdale, and that a judgment had been obtained by the holders against Fenn, which had been paid by him. The other witness was introduced by the defendant for the alleged purpose of impeaching the witness of plaintiff. Without stopping to inquire whether the ground was properly laid for this purpose, we proceed to notice the character of the testimony given by the last witness, and the declarations of law made by the court. This witness stated substantially that she was the widow of Dugdale, and was the administratrix of his estate until the date of her subsequent marriage with one Farrell; that about the time of the maturity of the note she received notice of its protest, and



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immediately called upon the witness of plaintiff, and was informed by him that it was a matter about which she need not trouble herself, and that plaintiff and himself were obliged to take it up and would do so. It was shown by the testimony in the case that plaintiff was the president and the first witness (Hunt) secretary of the Olive-street Plank Road Company, and that Dugdale at the time of the execution of the note was a contractor for a portion of the work on said road. The witness for the defendant also stated that at a time subsequent to the one referred to, she went to the office of the secretary aforesaid for the purpose of collecting an amount that was still due the estate of her late husband, and that the amount of the note sued upon with the interest to that date had been deducted by the secretary out of the claim of her said husband. A receipt together with the books of the company was introduced as tending to prove some facts and circumstances in corroboration of the theory of the defence, which was that this note and another executed at the same time for \$200, there being at that time no money on hand, really constituted a payment to Dugdale by the president and secretary for the company of which they were officers. The court gave two instructions at the instance of the plaintiff, the second of which is as follows :

"The conversation between Bridget Farrell (witness for the defence) and Charles L. Hunt is not evidence to prove any fact in said cause, and is not evidence for any purpose except to impeach the witness Hunt."

On the part of the defendant, the following were given :

"If the jury believe from the evidence that the consideration of the note was in fact a part payment to Dugdale for moneys due to him by the company, but that because of the inability of the company to pay its officers by their individual names endorsed the note sued on, taking the receipt of Dugdale for the sum thus paid, then the jury must find for the defendant."

"If the jury believe from the evidence that the note sued on was made between the parties with the understanding

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that it was to be deducted from the funds payable to Dugdale by the Central Plank Road Company, and it was so deducted, then plaintiff is not entitled to recover, and the jury will find accordingly."

There is no testimony in the cause upon which the two latter instructions could be based except the statement of Mrs. Farrell (who testified for the defense), together with the receipt spoken of, and the entries made upon the books of the company. This latter evidence however, unconnected with the statements of the witness, amounted to nothing. We must infer, therefore, that notwithstanding the instruction given for the plaintiff in reference to the testimony of this witness, still as the court had assumed that it did tend to prove certain facts in the cause and upon which the above declaration of law given for the defendant rested, the jury felt authorized to weigh it and did render their verdict accordingly. If the case had gone to the jury simply upon the evidence of the two witnesses explained by the instruction given for the plaintiff, and of which the defendant neither complains nor of which any modification was asked in any subsequent instruction, the verdict must inevitably have been for the plaintiff.

The note was payable to Fenn; there was no contradiction of the fact that he had paid the amount of the principal and interest due upon it, and had thereby re-acquired it from the parties to whom it had been negotiated; and admitting that Mrs. Farrell's statements of the conversation between herself and Hunt, the secretary of the company, were true, still there was no evidence that Fenn was present, or that he had in any manner assented to them. The plaintiff's case was the note with evidence of the fact of his being an accommodation endorser merely, and of its payment by him. Therefore no statements of Hunt could bind him unless his assent to the same had been made to appear satisfactorily.

The judgment of the Circuit Court must therefore be reversed, and the cause remanded for further trial. The other judges concur.



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Nicolay v. Fritschle.—Murphy v. Bottomer et al.

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JOHN NICOLAY, Respondent, v. JACOB FRITSCHLE, Appellant.

*Bills and Notes—Practice—Parties.*—The payee and holder of a note may institute suit thereupon in his own name, and it is no defence that he holds the note as trustee for a third party.

*Appeal from St. Louis Law Commissioner's Court.*

*Jecko & Clover*, for appellant.

*J. A. Beal*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought on two promissory notes made by the appellant in favor of the respondent. An answer was filed, alleging that the respondent was not the real owner of the notes; that although they were made and executed to him, they were given for a debt not due to him, but to one Busemeyer. On motion, the court rendered judgment in favor of the respondent, notwithstanding the answer, treating it as no defence to the action. The contract here made—the giving the notes—was with the respondent personally, and we do not think there can be any question about his right to maintain an action on them in his own name. If he took them in such a manner as to impress him with a trust, the beneficiaries may at any time institute proper proceedings for the assertion of their rights. But the respondent had the possession of the notes and the legal title; he, therefore, had such an interest as authorized him to sue.

Let the judgment be affirmed. The other judges concur.



ANDREW MURPHY, Respondent, v. JOHN BOTTOMER AND WILLIAM HAASE, Appellants.

*Bills and Notes—Consideration.*—A note given to procure the discharge of a criminal prosecution is without sufficient consideration to support the promise.

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Murphy v. Bottomer et al.

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*Appeal from St. Louis Law Commissioner's Court.**E. Peacock*, for appellants.*J. A. Beal*, for respondent.

FAGG, Judge, delivered the opinion of the court.

The only question that need be considered in this case, as it is presented by the record, is whether there was any consideration for the note sued upon. The suit was instituted before a justice of the peace of St. Louis county, and thence by appeal taken to the Law Commissioner's Court, where there was judgment for the plaintiff Murphy, and the case is now brought to this court by appeal. The defendant Bottomer seems to have been the principal in the note, and Haase the security.

It is shown by the testimony that, at the time of the execution of the note, Bottomer was under arrest as the witness, who was a justice of the peace, and who issued the warrant upon which he was arrested, says "upon a criminal charge." What the charge was is not stated, but that is not material. The officer stated further: "The affidavit was made by Murphy. I took Bottomer's bond for reappearance; he appeared next day. Bottomer then gave plaintiff a note for thirty days (the note sued on), and Murphy wanted security, so Bottomer went and brought in defendant Haase, who signed the note jointly with him. After the note was given to plaintiff, the defendant Bottomer was discharged from custody. No consideration passed between Murphy and Haase at the time, nor between Bottomer and Haase. The debt claimed was sixty-three dollars, and five dollars for the costs of the criminal case. The costs were incorporated in the note. There was nothing said about dismissing the case if the amount was paid." This is the only witness who testified in reference to the circumstances connected with the execution of the note.

There were other facts and circumstances developed in the trial all tending to prove the fact, that if there was any pre-

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tended consideration other than the dismissal of the prosecution against Bottomer, it was a criminal transaction in which the plaintiff Murphy figured quite as prominently as the defendant Bottomer. It cannot be pretended that there was any sufficient consideration to support the promise, and the judgment must be reversed and the cause remanded. The other judges concur.

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JOHN E. SHUETZE AND CHARLES F. EGGERS, Respondents, v.  
GEORGE BAILEY, CHARLES H. PECK, AND JAMES B. EADS,  
TRUSTEES OF CAROLINE GARNIER, Appellants.

1. *Agent—Contract—Sealed Instrument.*—An agent, to bind his principal by deed, must have authority under seal. Although an instrument purporting to be sealed may be invalid as a deed, it may be evidence of a contract between the parties.
2. *Evidence—Ambiguity.*—Parol evidence is admissible to explain the latent ambiguities of an instrument and to aid in its interpretation.
3. *Agent—Authority.*—The authority of an agent may be shown by the subsequent ratification of his acts by the principal.

*Appeal from St. Louis Land Court.*

On the trial, which was before the court sitting as a jury, the respondents offered to read in evidence a writing as follows :

“This agreement, made this 20th day of June, 1857, between Kenneth Mackenzie, agent for Volney S. Stevenson, of the first part, and George Bailey, of the second part, witnesseth : That whereas the said parties are proprietors of adjoining lots of ground, or parcels of land, in block 87 of the city of St. Louis, Mo., the northern line of the lot of the said party of the first part being the southern line of lot of the said party of the second part ; and whereas it is agreed that said party of the first part in building upon his lot shall put his northern wall upon the ground of said party of the second part and said party of the first part equally, so that the cen-

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tre of said wall may rest upon the dividing line of the two lots: Now, therefore, in consideration of said party of the first part so building his said northern wall, the said party of the second part, his executors, administrators or assigns, covenants and agrees that when he or they shall build upon his lot permanent buildings so as to use the *whole of said wall*, he will pay to the party of the first part, or his assigns, the value of the one-half of said party-wall, the said value to be computed and estimated at the time of such building. In witness whereof, said parties of the first and second parts have hereto set their hands and seals the day and year above written.—K. Mackenzie (seal), agent for Volney S. Stevenson. Geo. Bailey (seal). Witness—Chas. H. Peck.”

The appellants objected to the reading in evidence the said instrument, because it was not a contract between Stevenson and Bailey; the court overruled the objection and permitted the same to be read, subject to its legal effect.

It was proved at the trial that Louis Thanberger, under the lease from George Bailey, built a four-story building on Bailey's lot, extending from Third street back west 53 feet; that the same was a permanent building, and was finished in May, 1863; that in the erection of the same the north wall of the Stevenson building was used.

The appellants asked the following instructions:

1. The plaintiffs are not entitled to recover in this suit.
2. The contract read in evidence by the plaintiffs is not a contract between George Bailey and Volney S. Stevenson, and the plaintiffs are not entitled to recover.
3. Unless George Bailey, or his assigns, have built upon the lot secondly described in said petition permanent buildings or building, so as to use the *whole* of the wall standing on said lot erected by Volney S. Stevenson, the plaintiffs are not entitled to recover.
4. That if Volney S. Stevenson erected a five-story building on the lot first described in said petition, fronting on Third

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street, by 104 feet deep to the alley ; that the stone foundation of the northern wall of said building is two feet thick, and that the brick wall is twenty two inches thick for the first story ; that Louis Thanberger, lessee of George Bailey, in 1862 and 1863, erected a four-story building on the lot secondly described in said petition, only 53 feet deep ; that Caroline Garnier, grantee of George Bailey, in 1863 and 1864, erected a two-story building on the east side of said alley, only 51 feet deep ; that in the erection of the last two buildings only a portion of the northern wall of said Stevenson's building was used ; that for the said four-story building and said two-story building a wall of less thickness than the northern wall of said Stevenson would be amply sufficient,—then said plaintiffs are not entitled to recover.

5. In any event, the plaintiffs are only entitled to recover the value of so much of that portion of the wall used by said George Bailey, or his assignees, at the time of using the same.

Which instructions the court refused to give.

The court rendered judgment against George Bailey for \$1,300 and in favor of the other defendants. Bailey appealed.

*Cline & Jamison*, for appellants.

I. The court below erred in admitting in evidence the contract, and in refusing to give the first and second instructions asked by appellants.

The petition alleged a contract made between Volney S. Stevenson and George Bailey, and the said contract being under seal and made in the name of Kenneth Mackenzie, was in fact and in law his contract, and not Stevenson's with George Bailey.

All contracts under seal must be in the name of the principal—1 Sto. Ag. §§ 147-50 ; 2 Kent's Com. 631 ; Smith v. Alexander, 31 Mo. 193 ; Clark v. Courtney, 5 Pet. (U. S.) 319 ; Bogart v. DeBussy, 6 J. R. 93 ; Fowler v. Shearer, 7 Mass. 14 ; Elwell v. Shaw, 16 Mass. 42 ; Townsend v. Corning, 23 Wend. 435-41 ; Stone v. Wood, 7 Cow. 453 ; Spen-

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cer v. Field, 10 Wend. 87 ; Lutz v. Lenthicum, 8 Pet. 165 ; Stinchfield v. Little, 1 Me. 231 ; Hayes v. Hampton, 1 Har. & John. 622-709.

II. There was no sufficient authority shown or proven authorizing Kenneth Mackenzie to make said contract for Volney S. Stevenson.

III. The respondents were not entitled to recover against George Bailey unless he or his assignees used the whole of the wall, for the contract sued upon thus provides. The using of two-thirds of the wall is not the whole of the wall.

*Krum, Decker & Krum*, for respondents.

I. The court below did not err in admitting in evidence the contract sued on.

(a) This contract is that of Stevenson, not being within the rule of Sto. on Agency § 140, &c., and showing that the intention of the agent was to bind the principal—Wood v. Goodridge, 6 Cush. 120 ; Spencer v. Field, 10 Wend. 87.

(b) In any event, it was ratified by the principal and became thereby his contract—Bredin v. DuBarry, 14 S. & R. 27 ; Rogers v. Kneeland, 10 Wend. 218 ; Kelly v. Munson, 7 Mass. 319 ; Han. & St. Jo. R.R. Co. v. Marión Co., 36 Mo. 294 ; Sto. on Ag. § 242.

II. The appellant Bailey is estopped to deny his liability under the contract in question.

(a) It is immaterial whether his covenant be regarded as one running with the land, or the contract held to be akin to one concerning boundaries. In either case, Bailey is estopped : in the first, as covenantor ; in the second, by his silence during and since the erection of the wall. *Qui tacet consentire videtur*—Hempstead v. Easton, 33 Mo. 142 ; Blair et al. v. Smith, 16 Mo. 273.

III. The contract having been sustained, the respondents (grantees of Stevenson) can recover the value of half of the party-wall—Binlock, adm'r, v. Peck, exec'r, 2 Duer, 90.

The wall was used, in the sense of the contract. The buildings erected by Bailey's grantees were permanent structures.

The fact that these buildings did not cover the entire side of the wall cannot affect the question of damages. The court below properly refused appellants' instructions. The wall was used in *length*, and this constituted an entire use, in the sense of the agreement.

HOLMES, Judge, delivered the opinion of the court.

The contested questions arise upon the instructions refused for the defendants, touching the effect that is to be given to the contract in writing on which the action is founded. This was an agreement "between Kenneth Mackenzie, agent for Volney S. Stevenson, of the first part, and George Bailey, of the second part," witnessing that "whereas the said parties are proprietors of adjoining lots in block 87 of the city of St. Louis, the northern line of the lot of the said party of the first part being the southern line of the lot of the said party of the second part," and continuing to the end in the same style, the said party of the second party agreeing to pay to the said party of the first part one-half of the cost of building the party-wall which he was about to erect, whenever he should have occasion to build on his lot, and should use the whole of said party-wall, and concluding thus: "In witness whereof, said parties of the first and second parts have hereto set their hands and seals the day and year above written.—K. Mackenzie [L. s.], agent for Volney S. Stevenson. Geo. Bailey [L. s.] Witness—Chas. H. Peck."

It appeared from the evidence that it was Volney S. Stevenson who was in fact the proprietor of the adjoining lot, and built the party-wall, and was really the person intended as "the party of the first part"; that the contract so made was adopted by Stevenson, and by him assigned to the plaintiffs, to whom he had conveyed the lot on which his building was erected; and that, subsequently, buildings had been erected by Bailey, and those holding under him, on his lot, using the party-wall, the front building being four stories and the rear building two stories only in height; the plaintiff's building being five stories in height. The agreement read that



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"when he or they shall build upon his lot permanent buildings so as to use the whole of said wall, he will pay to the party of the first part, or his assigns, the value of the one-half of said party-wall, the said value to be computed and estimated at the time of such building." Judgment was recovered against Bailey alone for the sum of \$1,310.60, one-half of the cost of the wall being proved to have been \$1,559.21.

The court refused to instruct the jury for the defendants to the effect that the plaintiffs were not entitled to recover on the evidence, or that, in any event, they were not entitled to recover for more than the value of that portion of the wall which was used by Bailey, or his assigns, at the time of using the same. The plaintiffs did not ask for any instructions.

The determination of the case depends upon the construction that is to be given to the written contract, as to the right of the plaintiffs to sue upon it, and as to the use of the whole wall.

Where a sealed instrument purports in the body of it to contract in the name of the principal and to bind him, the execution of it by the agent in the manner in which this contract was signed would be sufficient to make it the contract of the principal, if there was an authority under seal; and whether or not such is the purport of the instrument, is to be gathered from the general tenor of it, rather than from any particular clause; and if the intention of the parties can be ascertained, such intention is to be carried into effect, if it can be done consistently with the rules of law.—Hale v. Woods, 10 N. H. 470; Deming v. Bullitt, 1 Blackf. 241; Wilks v. Back, 2 East, 142; Wilburn v. Larkin, 3 Blackf. 55; Varnum v. Evans, 2 McMull. 409; Shanks v. Lancaster, 5 Gratt. 118; Martin v. Dortch, 1 Stew. 479.

Parol evidence was admissible to explain the latent ambiguities of the instrument, and to aid in interpreting it—Smith v. Alexander, 31 Mo. 193. Upon the face of the paper, without the aid of extrinsic evidence, there might be

room for doubt whether the words "*Kenneth Mackenzie*, agent for Volney S. Stevenson, of the first part," referred to the agent or the principal as the party contracting; but the general tenor of the instrument purports that it was the proprietors of the lots who were in fact the contracting parties, and the evidence *aliunde* very clearly shows that it was Stevenson, and not Mackenzie, who was such proprietor. We think the case comes within the reasoning that would make this the contract of the principal; but as a contract under seal, it is ineffectual for want of an authority under seal.

Now if this was an instrument affecting real estate, this result would be conclusive of the case; but when the contract relates to personal property only, or is a mere agreement to pay money, though void as a contract under seal, the seal is unnecessary, and may be disregarded as surplusage, and it will be good as a contract not under seal, provided there were authority by parol for its execution; and such parol authority may be proved by a subsequent ratification—*Dispatch Line v. Bellamy Manuf. Co.*, 12 N. H. 205; *Hunter v. Parker*, 7 Mees. & W. 322; *Cooper v. Rankin*, 5 Binn. 613; *Van Ostrand v. Reed*, 1 Wend. 424; 1 Am. Lea. Cas. (3d ed.) 587.

Here the principal adopted the contract as his own, and assigned it to the plaintiffs as such, and there was a clear ratification of the authority by parol.

Under the present system of practice, the technical distinctions between the mere forms of action no longer exist. The petition stated the material facts of the case, and if there be a good cause of action stated, it matters not whether it be such as would have been *assumpsit* or *covenant* under the former practice. This petition states the case as upon an agreement in writing not under seal, and we think the allegations are sustained by the proofs, and that there is no material variance.

As to the matter of "the whole wall," the contract must receive a construction with reference to the subject matter and the intent of the parties. It could not have been intend-

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ed that the buildings to be erected by the defendants should literally cover every inch of the whole surface of the party-wall. The meaning of the parties must have been that a substantial use of the whole wall should be considered enough; and there was ample evidence on this subject to justify the verdict of the jury. Some allowance seems to have been made for the difference in the extent of the two buildings. We find no sufficient reason for disturbing the verdict. It results from these views that there was no error in refusing the defendants' instructions.

Judgment affirmed. The other judges concur.

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THOMAS C. JACQUES, JONATHAN S. JACQUES, JOHN WATERS,  
JOHN W. HUGHES, JOHN SHANKLIN, AND OSBORN REILY,  
Plaintiffs in Error, v. STEPHEN M. EDGELL AND ALEXANDER  
C. ANDERSON, Defendants in Error.

*Agent—Factor—Trust.*—Where an agent acts for an agreed compensation, or where there is no contract for a reasonable compensation, he will not be allowed to retain profits incidentally made in the execution of his duty, although it may have the sanction of usage. Where a person is actually or constructively an agent, all profits made in the business, beyond his ordinary compensation, are for the benefit of his employers.

*Error to St. Louis Court of Common Pleas.*

*Sharp & Broadhead*, for plaintiffs in error.

*Geo. P. Strong*, for defendants in error.

WAGNER, Judge, delivered the opinion of the court.

This was a suit instituted by the plaintiffs in error against the defendants to recover the profits on certain drafts drawn on New York and sold in St. Louis at a premium by the defendants, the said drafts having been purchased in New Orleans with money arising from the proceeds of a lot of pork belonging to plaintiffs and sold by the agents of defendants in New Orleans.

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The petition sets out that on the 31st of September, 1860, defendants agreed with plaintiffs to sell for them at St. Louis, Keokuk, or New Orleans, the product of 2,200 hogs then packed and in the hands of Clegham, Batly & Alexander of Keokuk, upon which defendants agreed to advance to plaintiffs \$10,000—to charge plaintiffs ten per cent. interest on the money advanced and two and a half per cent. commission for selling; the said property to be insured for the defendants at the expense of the plaintiffs till shipped, and to be insured when shipped by the defendants; that the \$10,000 was advanced to plaintiffs by defendants; that the property was received by defendants and forwarded to New Orleans, where the pork was sold by defendants for \$29,361.51, and the money received by them for plaintiffs; that the plaintiffs have paid back to the defendants the \$10,000 advanced together with the ten per cent. interest thereon, and the two and a half per cent. commission for selling and the insurance. The petition further avers, that with the money arising from the proceeds of the sale of the pork the defendants purchased at New Orleans certain drafts on New York at a discount and afterwards sold them at St. Louis at a premium; that defendants realized on said drafts the sum of \$2,209, for which they failed to account, and for which amount plaintiffs prayed judgment. To this petition the court sustained a demurrer, and rendered final judgment thereon, and the plaintiffs sued out their writ of error.

There is but one point and that is, whether the defendants were bound as agents of the plaintiffs to account for the proceeds of the drafts received for the sale of plaintiffs' property, or whether they were only bound to account for what the property sold at. Where an agent acts for an agreed salary or compensation, he will be held bound by the agreement; and where there is no positive or express contract, a reasonable compensation will be implied; but in neither case will he be allowed to retain profits incidentally obtained in the execution of his duty, even though it may have the sanction

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of usage—*Lees v. Nuttal*, 1 Russ. & M. 52; S. C. 2 Mylne & R. 819; *Reed v. Warner*, 5 Paige, 650; *Massey v. Davies*, 2 Vesey, 317, and the learned note by Mr. Sumner. The principal is in general entitled not only to the bare amount of what has been received by his agent, but also to all the increase which has been made to his property; and therefore, where a person is either actually or constructively an agent for other persons, all profits and advantages made by him in the business beyond his ordinary compensation are for the benefit of his employers—*Dunlap's Pal. on Ag.* 49; *Sto. on Ag.* § 211. The case of *Diplock v. Blackburn*, 3 Campb. 43, may be cited as precisely in point on the question here. There the master of a ship in a foreign port, from the state of the exchange, received a premium for a bill drawn upon England on account of the ship, and on a contest between the owner and the master for the amount of premium, it was contended that there was a usage for the masters of ships to appropriate such premium to their own use. But Lord Ellenborough rejected the claim of the master, and denounced the usage, if any such prevailed, as a usage of fraud and plunder. The same doctrine on similar facts is laid down in *Brown v. Litton*, 1 P. Wms. 140.

The plaintiffs entered into a contract with the defendants at a stipulated price, for which the defendants were to make certain advances and perform other duties as agents; the compensation was agreed upon, and they could make nothing more out of the transaction. They could not speculate out of the money of their principals, and if they made investments with the proceeds of the pork, whatever profits resulted from such investments enured to the principals' benefit.

The judgment must be reversed and the cause remanded. The other judges concur.

NANCY SULLIVAN, Appellant, v. MARIA R. FERGUSON, CHAS. R. FERGUSON, HENRY H. FERGUSON, JOSEPH PATTERSON, ADM'R OF JOHN H. FERGUSON, DEC'D, AND LEICESTER BABCOCK, ADM'R OF ANDREW DICKSON, DEC'D, Respondents.

1. *Conveyance — Contract — Description — Quantity — Consideration.*—Where land is sold at a given price per acre for the aggregate quantity contained in the tract, specified at a certain number of acres more or less, no provision being made for a survey to ascertain the precise quantity to fix the amount to be paid, the price and number of acres are to be taken as showing the amount to be paid.
2. *Vendors and Purchasers—Lien—Waiver.*—Where the vendor sells land and takes collateral security for the purchase money, he will be considered as waiving his lien upon the land conveyed.

*Appeal from St. Louis Land Court.*

This was a suit in equity by Nancy Sullivan to establish a debt against the estate of Andrew Dickson, deceased, and fix it as a lien on a tract of land owned by the widow and heirs at law of John H. Ferguson, deceased.

The petition stated substantially, that on the 9th of May, 1853, said Nancy Sullivan was the owner of a tract of land in St. Ferdinand township, bounded north by the Missouri river, east by the Mill tract and Laban Landen (now or formerly), south by Richard Bland, west by Henry W. Carter, and being the same tract on which Daniel Sullivan resided in his lifetime, containing one hundred arpents more or less, being a portion of survey 1960, confirmed to Morris James under Charles Desjarles, and the same tract of land acquired by said plaintiff of the heirs of Margaret Blair, who died seized of the same, having acquired the same at public sale under foreclosure of mortgage given by said Daniel Sullivan to Samuel W. Harwood, February 13, 1837; that on the same day said Nancy sold, by writing, said tract of land to Andrew Dickson. This contract recites that said Nancy had sold and conveyed by good and sufficient deed to Andrew Dickson, describing it substantially as above; that the title was defective by reason of small outstanding interests



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and irregular conveyances; that parties desired to remedy said defects; that Dickson on receiving his deed should pay her \$800; that Dickson should have the land sold by proceedings in partition in court with a view of procuring outstanding claims and remedying defects, or, if advisable, to do any and all acts and things in and about the business of making the title perfect, and for that purpose employ attorneys, &c.; Dickson to advance all moneys necessary, and all costs, expenses and moneys so advanced to be considered part of the consideration money to be paid by Dickson and deducted from what should be due to her for the land; said Dickson, after deducting all such costs and expenses and the \$800, to pay the residue coming to her as follows: one-half to be paid at the end of six months from perfecting title, and the other half one year thereafter, or eighteen months from perfecting title; all moneys paid to outstanding claimants, or to the sheriff or other officer, in partition for them, to be deducted as expenses; should partition be made in kind, Dickson to pay only for the land set apart to him as said Nancy's assignee; interest at six per cent. per annum to be allowed on deferred payments.

At the foot of the above agreement was a covenant by L. Babcock, in consideration of five dollars by said Nancy, that Andrew Dickson should faithfully keep and perform his part of the contract; that said Nancy conveyed the land immediately to Dickson, who took possession and paid the \$800; that on 21st October, 1854, Dickson commenced suit in partition against Polly Dozier and others; pending this partition suit Andrew Dickson conveyed the land to Alonzo Dickson August 5, 1855, who on November 10, 1855, conveyed the same to Fannie A. Dickson; that there was no valuable consideration for either of said last mentioned deeds.

In October, 1856, an order of sale was made in the partition suit; on December 1, 1856, the sheriff made the sale, and John H. Ferguson was the purchaser for \$4,000, and received the sheriff's deed, and took and had possession till his death November 21, 1863. That by agreement between



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Nancy Sullivan, Fannie A. Dickson, and John H. Ferguson, he (Ferguson) bought said land for his daughter Fannie A. Dickson; on this purchase Ferguson paid in cash \$1,333.33, and gave two notes and a deed of trust to secure the residue of the \$4,000, for \$1,333.33 each. All the defendants in the partition suit were ordered to come and claim their shares; no one came but Angus Langham, and the shares of the other defendants were adjudged to belong to the assignee of the plaintiff; that John H. Ferguson withdrew from the sheriff the cash payment, and never paid the two notes of \$1,333.33, and he only paid the costs and the sum due Angus Langham; that Fannie A. Dickson, as the representative of all parties in the partition suit save Angus Langham, receipted to the sheriff for the cash payment, and the notes aforesaid, as if her father had paid them; that by an agreement between John H. Ferguson, Fannie A. Dickson, and said Nancy, John H. Ferguson agreed to take said land as his own, and pay said Nancy the balance due her for the purchase money; that, at the instance and request of said Ferguson and Nancy, the tract of land was surveyed in 1853 by three competent surveyors, viz., Cozens, Woods and Wyatt, and found to contain  $159\frac{5}{16}$  acres of land, said survey being had for the sole purpose of ascertaining the amount due said Nancy; that immediately after, a settlement was had between said Nancy and Ferguson, all credits being allowed to said Ferguson, to his entire satisfaction; that Ferguson paid \$1,339.95 October 14, 1858, and paid on January 12, 1860, \$400 more; that the costs of the partition suit were \$364.85, expenses of surveys \$89, and the amount paid Angus Langham \$154.70—all which are credits on the contract; that the said deed and agreement vested a perfect title in Ferguson, and he knew said Nancy had not been paid; that Maria R. Ferguson is the widow of J. H. Ferguson, deceased—the other defendants, save Patterson, are his children; that on January 16, 1864, the children conveyed the land to their mother Maria; that the deed was without valuable or adequate consideration; that all the other defendants had no-

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tice; that Patterson is administrator of Ferguson, and Babcock is the administrator of Dickson; that \$1,033.68 is due plaintiff.

The plaintiff prayed for a judgment for her debt as claimed, and that it be enforced on the land of the widow of Ferguson.

The answer denied that said Nancy ever owned the whole land, and insisted that she sold the whole tract by metes and bounds as 100 arpents more or less; that she sold to Andrew Dickson land which she did not own, and required him by the contract to pass away the title to other persons, and agreed to receive from him pay for what she should appear to own at the end of the suit to be brought; that at her instance said Andrew brought the suit in partition, and by said suit it was adjudged that said Nancy owned of the said 100 arpents only  $63\frac{33}{100}$  arpents; that Polly Dozier owned  $14\frac{29}{100}$  arpents; that Angus Langham owned  $5\frac{9}{100}$  arpents; that the unknown heirs of Fielding Laird owned  $14\frac{29}{100}$  arpents, and Giles Sullivan  $17\frac{8}{100}$  arpents; that by the said articles of agreement between said Nancy and Andrew Dickson the quantity in the tract was fixed at 100 arpents; that the deed to Andrew Dickson fixed the quantity at 100 arpents; that by the conveyance of Andrew to Alonzo Dickson and by Alonzo Dickson to Fannie A. Dickson, she became the owner of all the interest which her husband Andrew had obtained, and was entitled to all moneys coming to him from the partition sale; that John H. Ferguson bought the land for \$1,000 at the sheriff's sale and paid for it at that price; that he bought said land for himself, not for Fannie—that she never paid any part of the purchase money; that the defendants had no knowledge or information as to any order of the court to pay all the partition moneys to said Fannie—they deny that Ferguson agreed with said Fannie and Nancy to take the land as his own, or that he agreed to pay said Nancy, and set up the statute of frauds and acts of limitation against all alleged oral agreements; that the moneys paid by said Ferguson were paid by request of Fannie A. Dickson

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and in part of his bid of \$4,000; that it is true said Ferguson gave Fannie Dickson his note for some surplus land over the 100 arpents, which notes also embraced some portion of the personal estate of Andrew Dickson; they denied that any portion of the purchase money remained due said Nancy on her contract of sale, and alleged that Nancy Sullivan is a rebel enemy of the United States.

The appellant read in evidence the contract between Nancy Sullivan and Andrew Dickson, dated May 9, 1853; the deed of Nancy Sullivan to Andrew Dickson, dated May 6, 1852, describing the land as containing 100 arpents more or less; power of attorney from Andrew Dickson and wife to L. Babcock, dated July 18, 1855; deed of Andrew Dickson and wife to Alonzo Dickson, dated August 3, 1855; deed from Alonzo Dickson to Fannie A. Dickson, dated November 18, 1855; deed of sheriff to John H. Ferguson, on sale in partition, dated October 23, 1856; the record of the suit in partition of Andrew Dickson v. Polly Dozier, Angus Langham and others—commenced in December, 1854; Redmond's receipt for \$400 for Mrs. Sullivan, dated January 12, 1860.

The plaintiff offered to read in evidence the record of a suit, "Fannie A. Dickson v. The unknown heirs of Fielding Laird and others," which on motion of defendants the court excluded.

Also plaintiff offered the following oral testimony:

Charles Bray stated he heard John H. Ferguson say on the day of the sheriff's sale, he wanted to buy for the widow as cheap as possible, and was buying for his daughter and her two children.

P. C. Morehead states that he and Babcock and Redmond were present at a settlement for the land, and produced a paper which he said was the settlement; on this paper was a balance struck of \$1,033.68; that Ferguson furnished the survey, and assented to the first item of the account making due to Nancy Sullivan, as the whole piece of land sold And'w Dickson, \$3,669.65; that Ferguson promised to pay the

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amount then due for the land to Mrs. Sullivan, but whatever he (Ferguson) so paid was to be deducted out of the \$4,000 he bid for the land, and Ferguson gave her a note for the balance due her; he (Morehead) looked to Ferguson to pay, because he bought the land;—no, he was mistaken; after paying Mrs. Sullivan, if anything remained, that was to go to Fannie Dickson.

Leicester Babcock testified that Ferguson bought for his daughter; the agreement was to sell the land at private sale, and whatever was left after paying Mrs. Sullivan was to go to Fannie; Ferguson got the cash and notes from the sheriff, except costs, expenses, commissions, &c.; the notes were cancelled. Ferguson held the land solely for his daughter. Mrs. Dickson agreed that her father might take the land—first pay Mrs. Sullivan, then pay Fannie \$17 per acre for 100 acres additional; the settlement was on this basis, October 14, 1858—*all* understood it. Ferguson agreed to pay plaintiff for  $159\frac{55}{100}$  acres at \$23 per acre—Mrs. Dickson \$17 additional for 100 arpents or acres, giving \$40 per acre for 100 arpents or acres, and then paid down \$1,339.75, and gave Fannie his note; afterwards Ferguson paid \$400, and that was all he ever paid on account of the land.

Cross-examined.—Q. “Are you certain Ferguson paid no more than you have stated for the land?” A. “I am.” Defendants’ counsel here showed the witness a note of Andrew Dickson for \$1,000, dated Mar. 20, 1855, and a check in favor of the witness for \$1,309, note drawing seven per cent., and asked witness what he knew about said papers. A. “I recollect now Ferguson was also to pay, and did pay, a deed of trust that Mrs. Cleveland had on the land. This is the note for the debt and the check to me in payment of it. Yes, I know Ferguson paid this debt to Mrs. Cleveland. My recollection is, the payment was allowed to Mr. Ferguson in his settlement with Fannie. Ferguson well knew of this deed of trust at time of settlement, and took it with full knowledge. The \$47.56 was repaid to me.” Q. “Why did you not mention this payment to Mrs. Cleveland before?” The

witness admitted he copied the petition when this suit was brought, and did not remember it then.

Redmond testified to being present at the settlement, and to Ferguson's promise to pay Mrs. Sullivan.

Fannie A. Dickson, who received all her husband's assets through deeds prepared by Mr. Babcock, and who should pay her husband's debts, corroborated the statement of Babcock about the \$17 per acre.

The defendants then read in evidence the deed of trust to secure the purchase money to the sheriff; also produced and read the cancelled notes, each for \$1,333.33; also read the note produced by Mrs. Dickson for \$1,287.24, given by her father to her October 14, 1858, and sundry receipts thereon from her father.

*Cline & Jamison*, for appellant.

I. The parol agreement of John H. Ferguson to pay the balance of the purchase money to appellant is not within the statute of frauds, and the appellant was entitled to judgment for said balance against the estate of said John H. Ferguson. The legal and equitable title in and to said land being vested in said Ferguson and possession delivered to him, he ought legally and equitably to pay for the same—Sug. on Vend. 401; *Rose v. Bates*, 12 Mo. 30 & 51; *Bean v. Vallé*, 2 Mo. 126; *Halsa v. Halsa*, 8 Mo. 303; *Doan v. Newman*, 10 Mo. 69. Where a verbal contract is completely executed by one party, the consideration can be recovered from the other notwithstanding the statute of frauds. As, for instance, when a deed for land is given in pursuance of the contract, an action lies to recover the price—*Browne on Stat. Fr.* (2d ed.) p. 119, § 117.

II. The appellant had a vendor's lien upon the land for the balance of the purchase money due her.

John H. Ferguson not only knew that the whole of the purchase money had not been paid, but promised, in consideration of the legal and equitable title in and to the said land being vested in him, to pay the balance of the purchase

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money to the appellant—Johnson v. Scott, 34 Mo. 129; Delassus v. Poston, 19 Mo. 425; McDonald v. Hulse, 16 Mo. 503.

III. Neither of the contracting parties knew the quantity of land, it being the remainder of a larger tract. The contract ought to be construed and enforced according to the intention of the parties, and the acts of the parties under said contract are evidence of that intention. John H. Ferguson paid appellant a much larger amount than would be due her for 100 arpents, all of which acts are conclusive evidence that the contract should be construed as a sale of the land by the acre—French v. Corburt, 1 Comst. (N. Y.) 96; Clark v. Wilbey, 19 Wend. 320; Stone v. Clark, 1 Metc. 378.

IV. Appellant, and those under whom she claims, having had thirty-five consecutive years' adverse possession of the land prior to the sale to Andrew Dickson, gave her an absolute title to the land (Biddle v. Mellen, 13 Mo. 335), which possession was delivered by appellant to Dickson, and by him to John H. Ferguson, and now held by his widow, children and administrator, they are estopped from gainsaying that they have not the title under said appellant—Lindell v. McLaughlin, 30 Mo. 28.

V. The mere fact that appellant took L. Babcock's guaranty that Andrew Dickson would perform his part of said contract is not a waiver of her vendor's lien, especially as John H. Ferguson promised, in consideration of the legal and equitable title in and to said land being vested in him, to pay her the balance of the purchase money due her for said land, and appellant looked to him for payment—Johnson v. Scott, 34 Mo. 129; Delassus v. Poston, 19 Mo. 425; McDonald v. Hulse, 16 Mo. 503.

*Glover & Shepley*, for respondents.

I. The question of lien or not in favor of Nancy Sullivan against the land sold by her to Andrew Dickson will depend on the nature of the contract which she made with said Dickson, and cannot be affected by any subsequent events.



No oral agreements of any sort, or among any persons whatever, can have the slightest bearing on the question. The oral agreements between Ferguson and Fannie Dickson and Nancy Sullivan, if really proved, are void under the statute of frauds; and immaterial if not void, so far as supposed to create a lien on the land. If there was a lien, it existed at the date of the contract of sale to Dickson, or not at all. No money being paid to Fannie Dickson, no use or benefit accrues to such party—11 Mo. 506.

II. The contract of sale by Nancy Sullivan to Andrew Dickson created no lien in her favor.

No lien was pretended to be reserved by her; because, 1. In the contract between Sullivan and Dickson of May 9, 1853, she requires "Dickson to proceed with all due diligence and dispatch to have the said farm sold in partition" to some third person. It was therefore at her instance the land was conveyed to Ferguson. This was a release of any lien she might otherwise have. In the same agreement, A. Dickson is authorized to make the "title perfect" by a sale; perfect, of course, in the vendee, for it could be perfect in no other person. This is an abandonment of the vendor's lien. The vendor has a lien "when there is no contract that the lien by implication was not intended to be reserved"—Garson v. Green et al., 1 J. Ch. R. 309. Here, the implication that the lien was not intended to be reserved arises on the authority given to Dickson to sell and convey the land prior to the time fixed for paying the purchase money, and on the express provision that all moneys arising on the land not belonging to Sullivan should be credited on the contract. Where land was sold and it appeared that the agreement of the vendor contemplated a sale of the land by the vendee prior to the payment of the purchase money, the lien was considered waived—4 Wheat. 290-4; 4 Curt. Cond. U. S. 404. 2. But there is no lien, because the security of the name of a third person was taken at the time of conveying the land to Dickson, that he should pay the purchase money—4 Kent, 153-4; Gilman v. Brown et al., 1 Mason, 192; Gilman v. Brown, 4



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Wheat. 255; Williams v. Roberts, 5 Ham. 35; Eckridge v. McClure, 2 Yerg. 84; Delassus v. Poston, 19 Mo. 429; Johnson v. Scott et al., 34 Mo. 129; Adams v. Cowherd, 30 Mo. 460.

III. But at the commencement of this suit there was nothing due to Nancy Sullivan on her contract of sale to Andrew Dickson, if a lien had been reserved.

The land was sold to A. Dickson by metes and bounds estimated in quantity at 100 arpents more or less, for the price and consideration of \$23 per acre.—Boar v. McCormick et al., 1 S. & R. 166; Fleet v. Hawkins, 6 Munf. 190.

There is no vagueness or uncertainty as to the boundary of the land sold and conveyed. The conveyance of a specific lot, as No. 78 in New York, is a conveyance by metes and bounds; and when such a lot is conveyed as containing "600 acres more or less," although on a survey the quantity really is only  $421\frac{1}{2}$  acres, there is no relief—Mann et al. v. Pearson, 2 J. R. 37-9; Smith v. Evans, 6 Binn. 106; Boxley v. Stevens, 31 Mo. 201; Large v. Penn, 6 S. & R. 488; Powell v. Clark, 5 Mass. 355.

HOLMES, Judge, delivered the opinion of the court.

The contract between the plaintiff and Andrew Dickson for the sale of the land to him, and the deed that was made to him as well as the subsequent conveyances, evidently contemplated that the tract of land sold contained about the quantity of one hundred arpents; that there were tenants in common who might be entitled to undivided shares with the plaintiff in the land; and that Dickson, the purchaser, should proceed to have a partition made by suit for the purpose of settling the respective rights of the parties in the premises and ascertaining her definite share; and that the title was fully conveyed to him by deed with a view to enable him by means of a partition sale to pass the whole title to the property to the purchaser at such sale, in case the sale of the land should become necessary. It was expressly stipulated in the contract of sale that if the land should be actually divided

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and the shares set off by metes and bounds, the quantity so set off to her vendee as his share should govern in settling the amount as paid to her at the rate of twenty-three dollars per acre. The partition that was made ascertained his share to be some sixty-three and  $\frac{3}{100}$  arpents. It was thus contemplated that her quantity might be less than the supposed content of the whole tract. It was not stipulated nor contemplated in the contract that a survey should be made for the purpose of ascertaining the exact number of acres contained in the whole tract sold, with reference to the amount of purchase money that was to be paid her. At the same time the plaintiff takes the written guaranty of a third responsible party for the faithful fulfilment of the contract and engagement of the vendee with her. The consideration expressed in the deed is large enough to cover the whole amount that would be due the vendor on the basis of her share being nearly equal to the whole tract; and it appears that she has been actually paid a larger amount than would be due to her on this basis. But it appears by accurate survey, subsequently made, that the tract really contained 149 acres.

The case comes within the principle, which must be considered as settled by this court, that where land is sold at a given price per acre for the aggregate quantity contained in the tract, specified at a certain number of acres "more or less," and no provision is made for a survey to ascertain the precise quantity for the purpose of fixing the amount to be paid, and both parties contemplate the aggregate limit named at which one is willing to sell and the other to buy, the price and the number of acres mentioned are to be taken as showing the amount of money to be paid, and the words "*more or less*" are not to unsettle this amount, and to leave the matter open to surveys, but are to be understood as indicating the agreement of each party to risk a variation in the quantity assumed—*Boxley v. Stevens*, 31 Mo. 197.

The variation here is very great, and we might have some difficulty in applying this rule to a case of this kind if the

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determination of the case depended upon this alone, though we are unable to find any other ground of distinction.

But it seems to be settled that where the land is conveyed by deed and with a view to an absolute sale of the property by the vendee to other persons, and to enable him to make a full title to the purchasers, and the vendor takes any other security for the purchase money, though only the personal security of a responsible person, the vendor's lien is to be considered as waived by the agreement and consent of the party. The security here guaranties the performance of the contract. It is laid down as the English rule that if a security be taken of a character and value which show that credit was exclusively given to that security, that fact is held to be entitled to much weight, though not conclusive in itself, and it still remains a question of intention to be collected from the circumstances which have taken place—Adams' Eq. 129. In the case of *Brown v. Gilman*, 4 Wheat. 290, where the circumstances were in many respects similar to this case, it was decided that an endorsed note was a collateral security, and discharged the lien of the vendor on the land itself for the purchase money. The same doctrine has been recognized by this court—*Delassus v. Poston*, 19 Mo. 425. If the matter stood here upon this guaranty alone, there might be some room for doubt as to the intention of the parties; but when considered with reference to all the circumstances and the objects the parties had in view, we are inclined to the opinion that the case comes within the reasoning of the adjudged cases, and that the vendor's lien was waived—*Gilman v. Brown*, 1 Mason, 191; 2 Sto. Eq. Jur. § 1226, note 2; 4 Kent's Com. 153; *Fish v. Howland*, 1 Paige's Ch. 20.

The vendor's lien being gone, there remains no ground on which the plaintiff can be entitled to relief by subjecting the land to sale. The effect of the subsequent settlement between the plaintiff and John H. Ferguson on the question of the liability of his estate on that settlement, is not involved in the decision of this case, and we give no opinion concerning it.

Judgment affirmed. The other judges concur.

CHARLES S. ROGERS, FRANCIS WEBSTER, AND RICHARD F. CONINGHAM, TRUSTEES OF ST. PAUL'S CHURCH, ST. LOUIS, Respondents, v. PHILIP CROW, WILLIAM BALLENTINE, AND EDWARD F. PITTMAN, TRUSTEES, &C., Appellants.

*Fixtures—Vendor and Vendee—Lands and Land Titles.*—Lamps, chandeliers, candelabra, sconces, brackets, and the various contrivances for lighting houses by means of candles, oil or other fluids, or gas, are not fixtures, and do not form part of the freehold so as to pass by a sale of the realty. Where in the erection of a church a recess was left to receive an organ, which was required to complete the design and finish of the building, the organ being attached to the floor and intended to be permanent—*held*, that the organ was to be considered as affixed to the freehold, and passed, as between vendor and vendee, by a sale of the realty.

*Appeal from St. Louis Court of Common Pleas.*

*Cline & Jamison*, for appellants.

By the refusal of the 4th instruction the court held that gas fixtures could in no case become a part of and pass with the realty as between grantor and grantee, although they be connected with or appurtenant thereto—*Cohen v. Kyler*, 27 Mo. 122; *Winslow et al. v. Merchants' Ins. Co.*, 4 Metc. (Mass.) 306; *Farrar et al. v. Stackpole*, 6 Greenl. 154; *Voorhis v. Freeman*, 2 Watts & S. 116; *Brother v. Clawson*, 2 Strobb. 478; *Harlow v. Harlow*, 15 Penn. 507; *Buckley v. Buckley*, 11 Barb. 43; *Roberts v. Dauphin*, 19 Pa. 71.

Stoves standing in their places are fixtures—*Blether v. Towle*, 40 Me. 310. A cistern standing on blocks in a cellar is a fixture—40 Me. 310; *Tuttle v. Robinson*, 33 N. H. 104.

*Sharp & Broadhead*, for respondents.

In the case of *Burke v. Baxter*, 3 Mo. 207, Judge Tompkins laid down the correct rule governing such cases.

See also case of *Hunt v. Mullanphy*, 1 Mo. 509. This was the case of a kettle and boiler put up in a tannery. The same rule is laid down.

The case of *Cohen v. Kyler*, 27 Mo. 122, does not overrule the principle laid down in these cases. The other cases from the Missouri Reports are cases where the question arose be-

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tween landlord and tenant, and in such cases a different and more liberal rule prevails—*Finney v. Watkins*, 13 Mo. 291; 28 Mo. 70; *Freeland v. Southworth*, 24 Wend. 191.

*Vanderpool v. Van Allen et al.*, 10 Barb. 157, was a case between mortgagor and mortgagee. The court said: "To make an article a fixture, it must not only be essential to the business of the erection, but it must be attached to it some way; at least it must be mechanically fitted, so as in ordinary understanding to make a part of the building itself."

*Walker v. Sherman*, 20 Wend. 636—"Nothing of a personal nature in itself will pass unless it be brought within the denomination of a fixture by being in some way permanently, or at least habitually, attached to the land, or some building upon it."

Articles movable in their nature, attached to the walls of a house by screws or nails, are not fixtures—*Gibbons on Fixtures*, 20 (11 Law Lib.); *Farmers' Loan & Trust Co. v. Hendrickson*, 25 Barb. 489, in which the doctrine is fully reviewed.

WAGNER, Judge, delivered the opinion of the court.

This was an action commenced in the St. Louis Court of Common Pleas by the respondents to recover the value of certain property which they alleged to be personal chattels belonging to them, and unlawfully possessed and detained by the appellants. From the record it appears that respondents were vestrymen and trustees for St. Paul's Parish, a Protestant Episcopal Church in the city of St. Louis, and that in their house of worship they placed an organ, gas fixtures, and other articles, for the convenient occupancy of the same. That being pecuniarily embarrassed they executed a deed of trust conveying the lot on which the house was built, together with all the buildings, erections and improvements, to secure the payment of their indebtedness. The notes which the deed of trust was taken to secure not being paid, the trustees in the deed sold the premises to satisfy the same,

and on the sale Derrick A. January became the purchaser of the property ; January afterwards deeded and conveyed the property to appellants, who are now in possession thereof. On the trial, respondents dismissed their cause of complaint as to several of the articles enumerated in their petition, and the court found that others passed by the sale with the premises as part of the realty, but refused to declare that the gas fixtures and the organ were fixtures, and decided that they were personal property detachable from the real estate, and therefore did not pass with it.

The evidence shows that when the church was erected there was a niche or recess left in the walls over the vestibule, in the front end of the building, expressly for the reception of an organ ; that the organ stands on a floor or platform built to receive it, and is fastened to this floor by nails driven through the outer case of the organ into the floor. In the rear of the organ the wall is in a rough unfinished state, and is pretty much without ceiling or finish. If the organ were removed, it would not only destroy the architectural design, finish and symmetry of the building, but would leave exposed to view the unfinished wall in the rear, and the open space above the organ which is now concealed by it. Skilful architects testified that they regarded the organ as a part of the church ; the internal finish of the building, architecturally considered, would not be complete without it.

If this contest had arisen between landlord and tenant, it would admit of little doubt ; for as between landlord and tenant many things which pass under the general name of fixtures will for the encouragement of trade be permitted to be removed by the tenant during his term, which as between heir and executor, vendor and vendee, or mortgagor and mortgagee, would be considered as part and parcel of the realty, and would therefore belong to the heir, or vendee, or mortgagee.

As to the first point presented in the case, it has been uniformly held that lamps, chandeliers, candlesticks, candelabra, sconces, and the various contrivances for lighting houses



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by means of candles, oil, or other fluids, are not fixtures, and form no part of the freehold.

In the case of *Lawrence v. Kemp*, 1 Duer, 363, the New York Superior Court decided that gas fixtures, when placed by a tenant in a shop or store, although fastened to the building, are not fixtures as between landlord and tenant.

In *Wall v. Hinds*, 4 Gray, 256, it was held that a lessee could take away gas pipes put by him into a house leased to him for a hotel, and passing from the cellar through the floors and partitions, and kept in place in the room by metal bands, though some of them passed through wooden ornaments of the ceiling, which were cut away for their removal.

In South Carolina a house and lot were sold under a foreclosure of mortgage, and a few days afterwards the sheriff, under execution against the mortgagor, removed and sold certain gas chandeliers and pendant hall gas burners, and the court decided unanimously that they were not fixtures which passed to the purchaser of the real estate by the conveyance of the land—*Montague v. Dent*, 10 Rich. 135.

The same question arose in Pennsylvania in the case of *Vaughen v. Halderman*, 9 Casey, 522, where property was sold by the sheriff in pursuance of an execution placed in his hands, and it was decided in the same way, the court holding that gas fixtures did not pass under the sale to the vendee as a part of the realty. In his opinion, Read, J., says: "The pipes connect with the street main, and are now carried up through the walls and ceilings of the house, with openings at the points where it is intended to attach fixtures for the purpose of lighting the rooms and entries. These are called gas fittings; whilst the chandeliers and other substitutes for the oil lamps and candles are called gas fixtures, and are screwed on to the pipes and cemented only to prevent the escape of gas; and may be removed at pleasure, without injury either to the fittings or to the freehold. There is therefore really nothing to distinguish this new apparatus from the old lamps, candlesticks and chandeliers, which have always been considered as personal property."



The next question, as to whether the organ is to be regarded as a fixture, is not entirely clear. Great diversity exists in the adjudications on this subject, and few decisions can be considered as absolute authorities in other instances, even of fixtures of a similar denomination. It will be found on an examination of the books, that considerations of custom, intention, ornament, convenience, and so forth, have all had influence in controlling the cases. Whilst it has been held that chattels should not be regarded as fixtures, unless they are so far incorporated with the structure of which they form a part that they cannot be severed from it without injuring the structure itself, as in *Farrar v. Chauffetete*, 5 Den. 527; yet the general course of decision is in favor of viewing everything as a fixture which has been attached to the realty, with a view to the purpose for which it is employed or held, however slight or temporary the connection between them—*Walmsley v. Milne*, 7 C. B. (N. S.) 115; *Wilde v. Waters*, 16 C. B. 637. In accordance with this rule, it has been held repeatedly that the machinery of a manufactory is to be regarded as a part of the realty, whether it is attached to the body of the building or merely connected with the other machinery by running bands or gearing which may be thrown off at pleasure and without injury to the freehold. In general, it may be said that as between vendor and vendee the purchaser is clearly entitled to everything that has been annexed to the freehold with a view of increasing its value or adapting it to the purposes for which it is used; and within this principle it has been held that pipes and bath tubs of a dwelling, the counters of a store, the vats, stills and kettles of a brewery or distillery, are fixtures—*Cohen v. Kyler*, 27 Mo. 122; *Tabor v. Robinson*, 36 Barb. 485; *Man v. Schwarzwald*, 4 E. D. Smith, 273; *Bryan v. Lawrence*, 5 Jones, 337.

Mr. Dane, in his *Abridgment of American Law*, remarks, "it is very difficult to extract from all the cases as to fixtures, in the books, any one principle upon which they have been decided; though being fixed and fastened to the soil, house, or freehold, seems to have been the leading one in

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some cases, though not the only one." And he further remarks, "not the mere fixing or fastening is alone to be regarded, but the use, nature and intention"—3 Dane's Abr. 156.

In *Teaf v. Hewitt et al.*, 1 Ohio, S. T. 511, Ch. J. Bartley, after a very able review of the authorities, reached the conclusion, that the united application of the following requisites might be considered the safest criterion of a fixture:—  
"1. Actual annexation to the realty or something appurtenant thereto. 2. Application to the use and purpose of that part of the realty with which it is connected. 3. The intention of the party making the annexation to make the article a permanent accession to the freehold; this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose and use for which the annexation has been made."

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In the building of the church, a space or recess was purposely left to be exclusively appropriated to the reception of an organ; that part of the building was left incomplete, and was never finished till the organ was put in position. This was necessary to give that part of the house perfection, symmetry, and make it conform to the intention and uses had in view when it was erected. Architecturally it was incomplete till the organ was fitted and fastened and the workmen closed their labors hiding the unfinished walls in the rear. The character or permanency of the annexation in this particular case can have no controlling or preponderating weight. Upon an examination of the design, use and adaptability, the evidence of intention was manifest and unmistakable, and the purchaser had a right to be governed by these considerations in regarding it as a fixture. In the execution of the deed of trust the grantors made no reservation, and it must be presumed that they intended everything should pass by their deed that was annexed to the realty and stand pledged as a security for the debt. Under all the circumstances, we are of the opinion that the organ was a

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fixture and formed parcel of the realty, and as such is rightfully the property of the grantees.

The judgment must be reversed and the cause remanded. The other judges concur.



SAMUEL C. W. MILLER, Defendant in Error, v. JOHN WHITSON AND JAMES B. MAUPIN, Plaintiffs in Error.

1. *Fraudulent Conveyances—Recording—Practice—Fraud.*—Under the statute of Fraudulent Conveyances, R. C. 1855, p. 802, § 8, the recording of a mortgage or deed of trust of personal property imparts notice to all subsequent claimants of the title of the mortgagee, although possession do not accompany the deed. The acknowledgment and recording of the deed removes the presumption of fraud arising from the possession not accompanying the deed. The deed imparts notice from the time of its being filed for record—R. C. 1855, p. 864, § 41.
2. *Practice—Replevin—Damages.*—If in an action for the delivery of personal property the verdict be for the defendant, the measure of damages will be the value of the property at the time of its taking under the writ, with legal interest thereon up to the time of trial.
3. *Practice—New Trials—Newly discovered Evidence.*—An application for new trial upon the ground of newly discovered evidence must show that the party has used all due diligence, and that the evidence is competent, material, and not cumulative.

*Error to St. Louis Circuit Court.*

Upon the trial of the case, the plaintiff asked the following instructions:

1. After the execution and recording of the mortgage deed from John W. Miller to Samuel C. W. Miller, Samuel C. W. Miller had the right to leave John W. Miller in possession of the property, and such possession by John W. Miller is not of itself evidence of fraud in the execution of the deed of mortgage.

3. If the sheriff of Franklin county, on the day this suit was brought, had the property sued for in his possession, and sold the same under an execution against John W. Miller, and defendant Maupin was present and purchased the prop-

erty, and it was then present and was claimed by said Maupin at the time of the sale and seizure herein, and it was not in the possession of any other person, then said Maupin had the possession of this property for the purposes of this suit.

3. A person in failing circumstances has the right to prefer and secure one creditor as security over the others, even although such others may not be paid; and if the mortgage read in evidence was made to secure Samuel Miller for liabilities as security for John Miller, and was accepted by Samuel Miller in good faith to secure him, then said mortgage was legal and not fraudulent.

4. It makes no difference what was the intention of John Miller in making said mortgage, if Samuel Miller took and held in good faith to secure him in his liabilities for John Miller; and no fraudulent or improper intention of John Miller not participated in by him can affect his rights under said mortgage.

All of which were given by the court.

Defendants asked the court to give the following instructions:

1. The jury are instructed that unless it appears in evidence that defendants had possession of the property in question at the time the same was taken by the sheriff under the writ of replevin, plaintiff cannot recover.

2. Unless the jury believe from the evidence that at the time of the replevin the defendant Maupin was in possession of the property seized, the plaintiff is not entitled to recover as against Maupin.

3. If the jury find for plaintiff, they can find against one or both of the defendants, as the evidence may warrant.

4. If the jury find for the defendants, they will find also the value of the property in controversy at the time the sheriff took it under the order in this suit, and also the damages, if any, sustained by the defendants, by reason of said property being taken from them, from the time of such taking to this date.

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5. If the jury believe from the evidence that the conveyance by John Miller to plaintiff was made for the purpose of defrauding, hindering or delaying his creditors, and if they believe also that plaintiff was conversant with this intention, they will find for defendants.

All of which were given by the court.

Defendants also asked the following additional instructions:

6. The jury, if they find for the defendants, may give such damages as they may think the use of the property is reasonably worth.

7. The jury are instructed that the continued possession of the property after the mortgage was given by John Miller was presumptive evidence of fraud, and becomes conclusive, unless they believe that plaintiff has shown that the mortgage was made in good faith and without fraudulent intent.

8. The insertion of a provision in a deed of trust or mortgage entitling the grantor to remain in possession of the property mortgaged, is fraudulent upon its face and void, and that provision in the contract may be proved if not inserted in the instrument.

9. Unless defendant Maupin had notice of the existence of the mortgage to Miller at or previous to his purchase of the property at the sheriff's sale, his right to the property is not affected by the mortgage.

Which instructions were refused by the court.

The jury found a verdict for the plaintiff.

There were affidavits of newly discovered testimony accompanying the motion for a new trial, but the motion was overruled by the court.

*Sharp & Broadhead*, for plaintiffs in error.

There seems to be but one question raised by the refusal of the court to give the last four instructions asked by the appellants, and that is as to whether the possession of the property mortgaged by the mortgagor was legitimate and consistent with good faith on the part of the plaintiff. This



question has been expressly decided by this court—Howell v. Bell, 29 Mo. 137; R. C. 1855, p. 804, § 8.

The 9th instruction asked by defendants was very properly refused, because, if recorded, the record imparted notice to all the world, by the provisions of the 8th section of the statute above referred to.

*Jas. B. Goff*, for defendant in error.

FAGG, Judge, delivered the opinion of the court.

The transcript of this record and proceedings in this case are of such a character as not to present very clearly the questions upon which the opinion of the court may be required.

We do not feel authorized to go back of the amended petition filed in the month of May, 1864. Many errors are complained of in the progress of the case up to that time. The defendants, however, filed their answer to this amended petition, and the case was tried upon the issues thus presented. The suit was brought in Franklin county and removed by change of venue to the St. Louis Circuit Court, where there was a trial had which resulted in a verdict and judgment for the plaintiff, to reverse which the defendants have sued out their writ of error.

The plaintiff Miller claimed the property sued for (being altogether personalty) by virtue of a mortgage executed in his favor by John W. Miller.

The defendant Whitson, being an execution creditor of the mortgagor, directed the sheriff of Franklin county to levy upon this property after the date of the filing of the mortgage for record, which was done. The other defendant, Maupin, became the purchaser of the same property at the sheriff's sale.

The defendant having put in issue simply the right of the plaintiff to the property, and the trial having proceeded mainly upon the idea that the only question to be determined by the jury was whether the claim set up in the petition was



rightful or not, we proceed to inquire whether any of the objections urged by the plaintiffs in error are well taken.

The instructions given both for the plaintiffs and defendants are in the main unexceptionable. Four instructions asked by the defendants, however, were refused and exceptions duly taken. These relate to the questions, first, of the measure of damages which ought to have been assessed by the jury in favor of the defendants in the event of a verdict for them; second, as to the presumption of fraud arising from the possession of the mortgaged property by the mortgagor; and third, to the question of notice to the defendant Maupin.

1. It is well settled by the decisions of this court that the measure of damages in such cases, when the finding of the jury is for the defendant, is the value of the property when taken, with legal interest thereon to time of trial. The use of the property, therefore, should constitute no part of the damages, and the instruction upon that point was clearly wrong.

The instructions upon the other two points may be examined together, as they both depend upon whether the mortgage was recorded or not. Section 8 of the "Act concerning fraudulent conveyances" (R. C. 1855, p. 802) received such a construction by this court in the case of *Howell v. Bell*, 29 Mo. 135, as to settle all controversy upon this question. It is provided by that section that where possession does not accompany a deed of trust or mortgage of personal property, the deed must be recorded to make it valid as to all persons other than the parties thereto. In the case referred to, it was said by Judge Napton, in delivering the opinion of the court, that "this section is a legislative interpretation of the first section, and amounts to a declaration that retention of possession by the grantor in a deed of trust or mortgage is not a trust in the grantor within the first section of the act." If the mortgage under which the plaintiff claimed the property was recorded, then the law presumes notice of the conveyance as to all persons whatsoever, and



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the possession of the property by the mortgagor could deceive no one as to the question of its ownership. This conveyance is preserved in the bill of exceptions and shows no irregularity upon its face. It seems to have been duly acknowledged and filed for record in the office of the recorder of land titles for the county of Franklin, March 13, 1861. The sale occurred on the second day of April following. The section just considered directs further, that conveyances of this character shall be "acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of lands are by law directed to be acknowledged or proved and recorded."

Section 41 of the "Act regulating conveyances" (R. C. 1855, p. 364) is as follows: "Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, *shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof, and all subsequent purchasers and mortgagees shall be deemed in law and equity to purchase with notice.*"

It would seem necessarily to follow—although not expressly declared by the statute—that at the time at which notice of these conveyances of personalty would be deemed to be imparted to the whole world must also date from the filing of the instrument with the recorder.

Some objection was made in the case to the certificate of the recorder, but it sufficiently appeared from the endorsements made by him that it was filed at the time heretofore stated. The failure of the officer to certify the fact under his seal of office, and with all the formality required by law, could make but little difference as to the question of notice. His certificate of the date of filing showed it to be prior to the sale, and the defendant Maupin must be considered as a purchaser with notice. The instructions upon the last two points considered were therefore erroneous, and the court properly refused them.

The last point for consideration is the application made by defendants for a new trial upon the ground of newly dis-

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covered evidence. Both of the defendants filed affidavits substantially to the same effect. Material and competent evidence was claimed to have been discovered soon after the trial, accompanied by a statement tending to show a sufficient degree of diligence on the part of each of the parties. It was also stated that there was not sufficient time to procure the affidavits of the witnesses themselves before the time fixed for the hearing of the motion. The record does not show the date upon which the court finally passed upon the motion, and we are therefore not in a position to determine whether its action in this particular was wrong or not. The proper inference to be drawn is that this portion of the application was not sustained by the facts, and that the diligence of the parties previous to the trial was not sufficient to enable them to derive any benefit from the discovery.

These applications, almost without an exception, are regarded by the courts with suspicion. A party should be held to the strictest accountability for a failure to ferret out previous to the trial the proofs necessary to sustain his case. As to the facts which it is alleged could be proved by the testimony of Judge Owens, it is enough to say that it was not competent to prove them in that way. If the records of the court were in any manner deficient, the deficiency might have been supplied by taking the proper steps. The testimony of the other witnesses mentioned could only affect the question of the fraudulent intent of the parties to the mortgage, and was simply cumulative in its character. The testimony of several witnesses in the course of the trial presented facts tending to impeach the conveyance to the plaintiff and to affect him with notice of the fraudulent intent of the grantor. The instructions of the court placed the whole matter before the jury in a light as strong as the circumstances would permit, and we will not undertake to say this newly discovered evidence, being merely cumulative upon that point, could have changed the result.

The other judges concurring, the judgment of the Circuit Court will be affirmed.

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Boyce's Trustees v. Mooney et al.

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CHARLES A. POPE AND JULIUS S. WALSH, TRUSTEES OF OCTAVIA BOYCE, Plaintiffs in Error, v. JOHN MOONEY AND LOUIS G. PICOT, Defendants in Error.

1. *Conveyances—Evidence—Certified Copies.*—Certified copies of conveyances may be read in evidence under the statute, R. C. 1855, p. 365, § 46, when the original is not in the control or possession of the party, his agents or bailees—*Barton v. Murrain*, 27 Mo. 235. A deed in trust will be presumed to be in the possession of the trustees or their beneficiaries.
2. *Practice—New Trials—Setting aside Non-suit—Mistake of Counsel.*—Non-suit set aside upon payment of costs, under the circumstances, it appearing that the counsel had given a mistaken construction to the statute and the decisions of the court thereupon.

*Error to St. Louis Land Court.*

*R. M. Field*, for plaintiffs in error.

*L. G. Picot*, for defendants in error.

HOLMES, Judge, delivered the opinion of the court.

It is assigned for error that the court below erred in overruling the plaintiffs' motion to set aside the non-suit and grant a new trial. The reasons for the motion were that the court erred in refusing to admit in evidence for the plaintiffs a copy of a marriage contract, duly certified from the office of the Recorder of deeds for the county of St. Louis; and that the exclusion of the paper, upon objection made, operated a *surprise* upon the plaintiffs' counsel.

The suit was commenced in 1856, in the names of the trustees to whom the land sued for was conveyed by the marriage contract, and the trial was had in 1864. The beneficiaries resided in Louisiana; their agent and the trustees in St. Louis. Suit was instituted, and counsel employed, through the agent who had charge of the business. It appears that the counsel went to trial, relying upon an opinion he had formed, from the previous ruling of this court upon the statute on this subject (R. C. 1855, p. 365, § 46), in the case of *Barton v. Murrain*, 27 Mo. 238, that the original would be presumed to be in the possession of the husband in Louisiana.

na, and that the trustees, as the parties plaintiff, would be entitled to read an office copy in evidence; and his affidavit states that he was taken by surprise by the objection of the defendants' counsel, and was unable to produce witnesses to show where the original was; that he believed the same was in the hands of the husband in Louisiana, but that the grounds of his belief were only the nature and contents of the instrument and the usual course in such transactions; and that, if a new trial were granted, the original paper could be produced, or its absence accounted for.

By this instrument the property of the wife was settled upon the trustees to her separate use, but the husband was entitled to one third of the annual income. The trustees held the bare legal title for the purposes of the trust, and both husband and wife were beneficiaries. The trustees were the only necessary parties to this action in ejectment, as representing the beneficiaries, but the suit was really for the benefit of the husband and wife only. Now, whether the original were in the actual possession of the trustees, or of either of the beneficiaries, or of their agent, it must be considered to have been *within the power* of the parties plaintiff, within the meaning of the statute; though it might be presumed from the nature of the paper, as well as other circumstances indicative of its place of custody, that the person to whom the possession rightfully belonged had the actual custody. In this case, we think the presumption would be rather in favor of the wife than the husband; but whether in favor of one or the other, it must have been equally within the power of the plaintiffs, so far as it would appear by the face of the paper—R. C. 1855, p. 365, § 46; Walker v. Newhouse, 14 Mo. 273.

In Barton v. Murrain, 27 Mo. 235, it was said that "the words of the statute '*not within the power*' should be construed as not within the control or possession of the party wishing to use a copy; that is, not in the possession of the party, his agent, servant or bailee, or other person under his control"; and that "if the original is presumed to be in the

hands of a third person, a copy may generally be read, without the preliminary oath or affidavit of the party wishing to use it." The counsel appears to have construed the instrument in such manner that it might be presumed to be in the possession of the husband as a third person and an inhabitant of an enemy's country during a time of civil war, with whom communication might be difficult, if not unlawful, and so not within the power or control of the parties plaintiff. There is much force in this view; but the suit was pending some years before the civil disturbances began, no efforts had been made to obtain the paper, and the counsel had relied upon the admissibility of the copy. We must hold that the non-production of the original was not sufficiently accounted for, and that there was no error in excluding the copy.

In the matter of surprise, we are referred to the peculiar provisions of the practice act of 1849—Laws of 1849, p. 87, § 3. We find nothing here that can justify any other than the ordinary and well settled meaning of a *surprise* in law, beyond the more liberal spirit which that act undoubtedly intended to inculcate in respect of the mere technicalities of pleading and practice.

It may be considered the established rule, that surprise may be, not must be, a ground for a new trial; as where it is occasioned by an act of the adverse party, or by circumstances out of the knowledge and beyond the control of the party injured by it; but it will not be allowed "when he might have been fully informed by the exercise of ordinary diligence, or when the surprise was induced by his own oversight, forgetfulness, or neglect."—*Matthews v. Allaire*, 6 Halst. 243; 3 Grah. on New Tr., by Waterman, 876; *Peers v. Davis*, 29 Mo. 184.

We are inclined to think that the situation of the counsel in this case arose rather from a mistaken construction of the statute, and the decision in *Barton v. Murrain*, than from any want of diligence or skill. In the case of the *People v. Barnes*, 12 Wend. 492, where the plaintiff had failed to make sufficient proof, for want of a decree of the surrogate's court

ordering the bond to be prosecuted, as required by the statute, supposing that he would be entitled to recover without that evidence, and was non-suited; though he was properly non-suited, the court granted a new trial on payment of costs, for the reason that the plaintiff had "fallen into an error in his construction of the statute, and might have a good cause of action in point of fact within the decision." As in this case, it seems to have been a surprise resulting from an error of opinion rather than from anything which could justly be called ignorance, remissness, or neglect. The disturbed condition of the country, and the difficulty of communicating with parties resident in Louisiana, may reasonably be allowed to afford some excuse for an apparent want of that diligence which would ordinarily be required.

The cases relied upon in support of the action of the court below are distinguishable from a case of this kind. In *Cockrill v. Calhoun*, 1 Nott. & McC. 285, the error consisted in overlooking a part of the will on which the plaintiff's right to recover depended; and it was said, that a surprise can never be admitted "when it arises out of the *face* of the paper on which *alone* the right of the party to recover depends." Here, the want of diligence and skill was manifest, and scarcely admitted of excuse. In *Murray v. Murray*, 2 Hayw. 290, it was merely held, that if a plaintiff presses for a trial, "and it is found on the trial that the testimony he relied on cannot be given in evidence as he expected, and he be non-suited," the allegation of surprise shall not prevail. It does not appear by the report what that testimony was, but it may be supposed that a want of diligence, or mere ignorance of the law, was apparent. So, also, where the papers had been shown to counsel the day before the trial, and it had not occurred to them that the original would be required, and they did not remember that it would be wanted on the trial, it was held that "this was no surprise, but *sua negligentia*," and the court refused to set aside the non-suit. —*Thompson v. Thompson*, 2 Hayw. 405. It was plainly a case of mere inattention and neglect. In the case of *Jackson*



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v. Horton, 9 J. R. 77, the plaintiff had not come prepared with sufficient proof of any kind to make out his case on the trial, and it was decided only that a new trial would not be granted merely "because the party came to trial unprepared." We see nothing to object to, in any of these decisions; but we do not find that they exactly cover this case.

Of like character was the case of Hite v. Lenhart, 7 Mo. 24, where the copy of a deed was certified from a clerk's office in the State of Kentucky, and the plaintiff claimed a surprise on the ground that, having lately come to the State, he was unacquainted with the statute law, and thought such copy would be evidence under the statutes. The court said: "Surprise in matter of fact, when due diligence has been used, may be good cause for a new trial, but not in matter of law; because, if due diligence be used, counsel cannot be surprised in matter of law." We do not doubt that this is a correct statement of the rule. Mere ignorance of the law, when by due diligence it might be known to any competent attorney, would clearly not excuse him. But there may be questions of the proper construction of a statute, or of a judicial decision, upon which very learned counsel might reasonably differ in opinion without much fault on their part, as the case was in the *People v. Barnes*, and as we think may have been the case here. The rights and interests of the parties are not wholly to be overlooked, and it would require a more rigid application than the whole circumstances would appear to justify, to bring the case within the strictness of the rule.

For all that appears, the plaintiffs may have a good cause of action; but little would probably be gained by the defendants by a refusal of the motion; and we think the ends of justice will be the better subserved by granting a new trial, on the condition of paying costs.

Judgment reversed and the cause remanded. The other judges concur.



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Dalton v. Fenn et al.

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PAULINE DALTON, Respondent, v. MARTHA FENN AND THOS. J. MCNAIR, Appellants.

1. *Conveyances—Revenue—Register's Deed—Lands and Land Titles.*—The deed of the Register is *prima facie* evidence of title in the purchaser at a tax sale only when the deed is duly acknowledged and recorded in conformity with the statute relating to conveyances—*Stierlein v. Daley et als.*, 37 Mo. 483, affirmed.
2. *Conveyances—Revenue—Collector's Certificate—Lands and Land Titles.*—Under the revenue act of 1857, to make the collector's certificate of sale for taxes *prima facie* evidence of right of possession in the purchaser at the sale, the certificate must be executed, acknowledged and recorded in the same manner as a conveyance of land. After the two years limited for redemption have passed, the holder of the certificate may procure a deed, but he cannot defend his possession against a party showing a legal title upon the certificate merely.

*Appeal from St. Louis Land Court.*

This was an action of ejectment for a tract of land in the county of St. Louis, brought by Pauline Dalton, respondent, against the appellants.

The plaintiff introduced and read in evidence—1. Deed dated September 9, 1851, from William S. Hereford and wife to John Dalton, the husband of the plaintiff; 2. Deed dated January 8, 1855, from Dalton and Pauline, his wife, to one William Fulton; 3. Deed of trust dated same, January 8, 1855, from said William Fulton to the trustees of said John Dalton; 4. Deed dated August 12, 1865, by said trustees to the plaintiff, Pauline Dalton—this deed was acknowledged and recorded September 22, 1865.

Plaintiff then introduced as a witness the said William Fulton, who stated: "I know the real estate described in the petition; I formerly had possession of it; the defendants had possession of it on the 21st day of September, 1865."—Here the plaintiff closed.

Defendants introduced as a witness William Hardy, who stated that "on the 19th day of October, 1859, James McDonough was collector of the revenue for St. Louis County;

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at that time I was his deputy. I know the certificate dated October 19, 1859; it was issued by me at its date to Thomas J. McNair. I know the handwriting of John F. Houston, who in the years 1860 and 1861 was Register of Lands in this State. The signatures to the deeds dated respectively November 12, 1860; October 28, 1861, and October 28, 1861, are genuine. I never saw him write, but the signature looks like that in other deeds purporting to be signed by him."

Defendants then read in evidence—1. Tax certificate, in the usual form, dated October 19, 1859, from said McDonough, as collector of the State and county revenue for the County of St. Louis, to the said McNair, for the property in question, the same having been sold at a sale commenced on the first Monday in October, 1859, for the taxes for the year 1858. On this certificate was endorsed a transfer or assignment, for value received by said McNair, to the defendant Martha Fenn, dated January 3, 1861. These were recorded in the Register's office, October 28, 1861. 2. Deed from the Register to the said McNair dated November 12, 1860, recorded in the Register's office and filed for record in St. Louis county November 7, 1861, but which deed was not acknowledged by the Register. 3. Deed from the Register to said McNair, dated October 28, 1861. This deed was also recorded in the Register's office, but was neither acknowledged nor recorded in the county of St. Louis. 4. Deed from same to same, dated October 28, 1861; recorded in the Register's office and filed for record in St. Louis county November 7, 1861, but not acknowledged by the Register.

The bill of exceptions states that "the plaintiff objected to the said certificate and deeds at the time they were offered in evidence, but that the court admitted the same subject to the objection, and would declare the effect of the same."

William Fulton, for the plaintiff, stated in rebuttal, that the taxes for 1858 were not demanded of him personally; that they might have been demanded on the premises, of his agent; that he was frequently absent, and could not tell

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what might have transpired while absent ; that he had sufficient personal property in each year to pay said taxes, and the same could have been made by the collector.

The plaintiff asked the court to give the following instruction, which was given : " If the deeds read in evidence by the plaintiff are genuine, the title of the plaintiff is a better title than the defendants', and the plaintiff is entitled to recover."

The court gave judgment for the plaintiff. The defendants appealed.

C. G. Mauro, for appellants.

Although the Register's deeds may not have been properly proved (we do not understand the court to have excluded them), still the collector's certificate was available as a defence to the action.

The 15th section of the 5th article of the Revenue Act of 1857 makes the certificate *prima facie* evidence of title until the expiration of the time for redemption, and warrants the purchaser in taking possession and using the premises. The only restriction is that he shall not cut or carry away any timber on the land until the time of redemption shall have expired.

How did the plaintiff attempt to overcome this *prima facie* title of the defendants ? Solely upon the ground that the collector had not used due diligence to collect the taxes. The evidence of Fulton, in rebuttal, was given upon this supposition alone.

To this position there are several answers. The 22d section of the 3d article of the act does give authority to the collector to seize and sell the goods and chattels of the persons liable for the taxes, after demanding payment, or visiting his place of abode for that purpose, and the lapse of ten days thereafter ; but this is not mandatory, but merely cumulative—Thompson v. Carroll, 22 How. 422 ; Martin v. Canon, 2 Dutcher, 228.

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*Cline & Jamison*, for respondent.

I. The tax certificate and the pretended tax deed for taxes for 1858 were void for uncertainty in the descriptions.

II. None of the pretended tax deeds were under seal, were not acknowledged, nor had any subscribing witnesses, and of course were not duly executed—*Stierlein v. Daley et als.*, 37 Mo. 483.

III. There was no legal proof of the execution of any of said pretended tax deeds.

IV. The law was not complied with. It was the duty of the collector to levy upon personal property and sell the same for the taxes; which he failed to do.

Fulton had sufficient personal property, and, if the collector had done his duty, would have been paid as collected. Acts 1857, p. 87, § 22.

WAGNER, Judge, delivered the opinion of the court.

This was an action of ejectment brought by the respondent against the appellants for a tract of land situated in St. Louis county. Upon the trial in the court below, without a jury, the respondent adduced in evidence a good and valid title to the premises by a chain of regular conveyances. The appellants introduced against the objection of the respondent a certificate of purchase from the collector under a tax sale, and also three deeds executed by the Register of Lands, conveying the property to McNair who bid it in at a sale for taxes. Neither the certificate nor the deeds were ever acknowledged by the collector or register who executed them. On this evidence the court declared the law to be that the respondent had the better title, and gave judgment accordingly, and an appeal was taken to this court.

The controversy arises under the revenue act of 1857, and the case is not distinguishable from *Stierlein v. Daley et als.*, 37 Mo. 483. In that case Judge Holmes very carefully considered the subject, and it was held that deeds executed by the register were *prima facie* evidence of title in the pur-

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chaser only when duly executed and recorded, and that they were not duly executed unless proved or acknowledged in the manner provided by the act relating to conveyances in the Revised Statutes.

It is, however, insisted that the certificate of purchase should have been held good, independently of the defectiveness in the deeds. By the 15th section of the fifth article of revenue act (Laws of Mo., Adj. Sess. 1857), it is made the duty of the collector, upon full payment of the amount for which any tract of land or any town lot is sold, to grant to the purchaser a certificate thereof, which certificate shall be *prima facie* evidence of the title to the premises thus sold, until the time for the redemption of such lands shall have expired, and shall warrant the purchaser in taking possession of and using the premises, but such purchaser shall not cut or carry away any timber on the land so purchased until the expiration of the time for redemption. The 42d section of the same act declares that every certificate furnished by the 15th section and every tax deed shall be taken to be within the terms and meaning of the 40th, 41st and 42d sections of the act entitled "An act regulating conveyances," approved December 11, 1855. No distinction is made between the manner of executing and acknowledging certificates and deeds. If it is essential to the validity of a deed that it should be acknowledged by the person executing it, agreeably to the statute concerning conveyances, it is equally so with the certificate. They are both blended and conjoined together, and no discrimination can be made between them. It is idle to argue that there is no good and substantial reason for requiring the certificate to be acknowledged; it is sufficient for us to know that such is the law, and in a case like this we do not consider ourselves called upon to furnish reasons in justification of it.

From a careful perusal of the 15th section the inference is irresistible, that the certificate, even when made out and acknowledged in due form, was never intended to confer title. It is merely evidence of title which authorizes the purchaser

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to take possession of the premises for a limited period, and expressly prohibits him from committing waste. He is not permitted to deal with the premises as if he possessed the title or owned the fee. After the expiration of the time for redemption, he may acquire title by a compliance with the law, but before that time he cannot defend against a party who presents a title valid and legal. In this case, however, the time for redemption had expired long before the institution of the suit, and the party could rely upon nothing but the deed.

The judgment will be affirmed. The other judges concur.

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MARGARET CLARKSON, AND ANN ELIZABETH, CLARA AND ROBERT CLARKSON, JR., BY MARGARET CLARKSON, THEIR NEXT FRIEND, Plaintiffs in Error, v. CHARLES CREELY AND THOMAS C. LUNEY, Defendants in Error.

*Equity—Mortgage—Fraud.*—Where the sale, under a deed of trust to secure payment of a debt, was procured by fraud by lulling the owner of the land into security by the promise of the creditor not to sell without first making demand, the court set aside the sale and granted permission to redeem. (See S. C., 35 Mo. 95.)

*Error to St. Louis Land Court.*

A. J. P. Garesché, for plaintiffs in error.

Glover & Shepley, for defendants in error.

FAGG, Judge, delivered the opinion of the court.

This case was before the court on an appeal from the St. Louis Land Court and determined at the March term, 1864—35 Mo. 95. Judgment in favor of the defendants had been entered up in the Land Court upon issue joined in demurrer, and it was reversed and remanded for further trial. The defendants answered and a trial was then had upon the merits. The judgment being for the defendants, it is

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again brought to this court by writ of error. In considering the questions presented by the petition, the facts being taken to be true, it was settled that the act of Luney "in proceeding to enforce the deed of trust without notice to Mrs. Clarkson of the acceptance or rejection of her offer, or of his intention to cause the property to be sold under the deed of trust, was a fraud upon her which authorizes a court of equity to interfere and permit her to redeem the land. Of course, the only question presented now is whether the facts proved on the trial are sufficient to support the allegations in the petition.

A witness named Peter Foster was introduced in behalf of the plaintiffs, and all the facts proved are to be gathered from his testimony. No testimony was offered by the defendants. The case is very fully stated in the opinion of Judge Bates and need not be repeated here. Foster stated, that (to use his own language), "at the instance of Mrs. Clarkson, I went to see Luney about the note and deed of trust (the subject matter of this litigation); I understood from her that he was about to sell the property over her head, and that I should try to save her. I asked him about the matter, and he said that he did hold the note and that he wanted his money. I asked him how much it was, as I would raise the money to save the property to the widow, offering to pay part down and the balance within a week or ten days. He then answered me that he was about to make a trade; that if he did, he would want the whole money, and if not, he would not want any; that he could not positively tell for a week. I then agreed with him that he should let me know whether he wanted it or not, and if he did, I would see that he got it, as I would myself pay it to him; and *he then agreed that he would do nothing under the deed of trust until he let me know.* I then saw Mrs. Clarkson and told her of it."

There could have been no pretence on the part of Luney that this was a mere intermeddling by Foster on his own account and to accomplish some purpose for his own benefit.



He must have understood all this as coming directly from Mrs. Clarkson. The very circumstances of the case would have suggested such a thing if nothing at all had been said during that interview to convince him that such was the fact. At the instance of Mrs. Clarkson, he had taken up this identical note to save the property for the widow and her children. It was no new thing, then, for some friend to interpose on behalf of this woman to prevent her property from being sold. He must have known when he made this promise that he was in point of fact dealing with Mrs. Clarkson and not Foster. He does not pretend on that occasion that his want of money was an absolute one. It was expressly stated to be conditional merely, coupled with a promise that when the condition happened the witness should be informed and through him Mrs. Clarkson, because that is the true intent and meaning of what was said. In the meantime no step was to be taken under the deed of trust. No suspicion was expressed as to Foster's ability to do what he had promised ; he is not treated as a man intermeddling with something that did not concern him, and his residence was so situated with reference to Luney's that it was an easy matter to have communicated with him at any time that he might be compelled to raise money. All these facts may possibly be consistent with the good faith of Luney in this transaction, but it must be said that they were such as to lull Mrs. Clarkson into security in reference to a sale of the property. She gave herself no further trouble about the sale, did not look for any more advertisements of the property, and it is not at all wonderful that in a few weeks thereafter the property was advertised and actually sold before she or Foster had any knowledge of it. Now if this had been a trap designed and intended by Luney to cheat this woman and her minor children out of this property, it could not have been more exactly suited to the purpose than it was. But it is not necessary, in order that justice may be done these parties, that such a conclusion should be drawn from the facts. Whatever was

intended, it is clear to us that the acts of Luney operated as a fraud, and he cannot be permitted to reap any benefit from them.

Luney himself being the purchaser of the property at the sale, is of course affected with full knowledge of all facts in the case. His bid at the sale was \$1,050, and the witness says "the property was safely worth some \$1,500." We conclude therefore that the allegations contained in the petition were sufficiently supported by the testimony.

An effort was made to prove a tender of the amount due upon the note, with the costs and expenses of the trust, made previous to and again at the time of commencing the suit. The evidence is not sufficient for that purpose and therefore no notice can be taken of that point. The judgment of the Land Court in dissolving the temporary injunction and assessing the damages therefor, as well as the decree for the defendants upon the petition, must therefore be reversed.

Upon a careful examination of the record in the case, there seems to be no reason for remanding this cause for a further trial, but such judgment will be given here as ought to have been entered up in the court below. It is therefore ordered that the sale of the property mentioned in the petition be set aside and held for naught; that the said Creely, as trustee, be perpetually restrained and enjoined from executing a deed to the same to Luney, or the performance of any other act or thing under said deed, and that the said plaintiffs be permitted to redeem the said property by paying the amount of the note held by Luney with ten per cent. interest thereon from the time of its transfer to him; and the cause is remanded to the St. Louis Circuit Court, that, in conformity with this decree, it take an account between the parties.

The other judges concur.

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Bircher v. Parker.

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RUDOLPH BIRCHER, Appellant, v. THEOPHILUS PARKER, Respondent.

*Landlord and Tenant—Injunction—Damages—Fixtures.*—Where the landlord, before the expiration of the term, enjoins the tenant from removing the fixtures, the tenant will be allowed a reasonable time after the dissolution of the injunction within which to demand and remove the fixtures, although the term may have expired pending the injunction. The value of the fixtures is not to be assessed as damages upon dissolution of the injunction.

*Appeal from St. Louis Circuit Court.*

*Krum, Decker & Krum*, for appellant.

I. The general rule is, that whatever is once annexed to the freehold becomes part of it, and can be removed by him only who is entitled to the inheritance.

Modern innovations as between landlord and tenant have excepted improvements made by the tenant for purposes of trade or manufacture—*Kelsey v. Durkee*, 33 Barb. 410; *Moore v. Wood*, 12 Abb. Pr. 393; *Penton v. Robart*, 4 Esp. 33; *Moore v. Smith*, 24 Ills.; *Empsen v. Soden et als.*, 4 B. & Adol. 655; *Powell v. McAshan*, 28 Mo. 70; *Ombury v. Jones*, 19 N. Y. 234; *Van Ness v. Packard*, 2 Pet. 137; *Pemberton v. King*, 2 Duer, 376; *Kirwan v. Latour*, 1 Har. & J. 289; *Schlemmer v. North*, 32 Mo. 207.

It seems that even where the improvements have been made for purposes of trade, the intention of the tenant to use them only temporarily must appear before he can be allowed to carry them away. Anything conveying the idea of a permanent improvement is part of the freehold—*Buckland v. Butterfield*, 4 Moore, 440; *Woodf. Land. & T.* 468; *Teaf v. Hewitt*, 1 Ohio, 511; *Goff v. O'Connor*, 16 Ills. 423; *Wall et al. v. Hinds*, 4 Gray, 256, 270-1.

The declaration of law by the court below, therefore, is too sweeping, and is not in conformity with the current of authority—*Schlemmer v. North*, 32 Mo. 207; *Ombury v. Jones*, 19 N. Y. 234.

II. The court below erred in their assessment of damages.

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The court treated the appellant's injunction like an unlawful conversion and assessed damages as in a case of trover.

It is not true that the respondent could not lawfully enter and take away his improvements after the dissolution of the injunction. His title to the chattels remains unimpaired; within a reasonable time after the dissolution of the injunction he could have taken away his improvements. The fact of his term having expired can make no difference. The landlord cannot take advantage of his own wrong. The tenant could obtain his chattels by an action in trover if the landlord refused him entrance upon the land—*Holmes v. Trempe*, 20 Johns. 29; *Mason v. Fenn*, 13 Ills. 529.

*Glover & Shepley*, for respondent.

I. The lessee had the right to remove the improvements during the lease without material injury to the freehold.—*Powell v. McAshan*, 28 Mo. 70; *King v. Wilcomb*, 7 Barb. 253; *Dubois v. Kelly*, 10 Barb. 496; *Van Ness v. Packard*, 2 Pet. 137; *S. C. 8 Curtis*, 53; *Finney et als. v. City of St. Louis et al.*, 39 Mo. 177.

II. The tenant under the law had no right to remove after the expiration of the lease; this is well settled;—but the plaintiff by his injunction prevented the removal till the time of this right of removal had ceased. The plaintiff must be considered as having caused this result, and prevented the removal in time, and as having appropriated the property in these improvements. No sooner did the defendant procure judgment for his damages than the plaintiff appealed and stopped the collection of it. In the meantime the plaintiff kept possession of the property and drew rents from it, and holds it now. The landlord never offered to release the property.

WAGNER, Judge, delivered the opinion of the court.

The defendant held over after the time for which the premises were originally let, but the holding was with the consent of the landlord, and was therefore a tenancy from

year to year, upon the same terms and conditions as those contained in the lease; and whatever erections he made while in possession of the premises, for the more beneficial enjoyment of the same, he had a right to remove before the expiration of the term, provided they could be severed without material injury to the freehold. As between landlord and tenant, the rule in regard to the removal of fixtures is most liberally construed in favor of the latter. As the landlord pays nothing for the improvements put up by the tenant, policy and justice demand that the tenant should be allowed to remove the additions or improvements unless the removal would operate to the prejudice of the inheritance, by leaving it in a worse condition than when he took possession. The evidence discloses the fact that the buildings could have been detached and severed without any serious injury to the realty, and that the damage to the wall of the permanent house in consequence of the severance could have been repaired at a trifling or nominal expense. And the right of the tenant to remove fixtures has been decided in many cases of the highest authority, where the facts were not stronger in his favor than in this case—*Van Ness v. Packard*, 2 Pet. 137; *Wall v. Hinds*, 4 Gray, 256; *Holmes v. Tremper*, 20 Johns, 29; *Ombury v. Jones*, 19 N. Y. 234; *King v. Wilcomb*, 7 Barb. 263; *Dubois v. Kelly*, 10 Barb. 496; *Kelsey v. Durkee*, 33 Barb. 410.

The tenant here left the possession of the premises without removing the fixtures, but this cannot redound to the benefit of the landlord. Before the time expired to terminate the tenancy the landlord sued out an injunction, and the tenant was prevented by this interference from making the removal. Under such circumstances it would be wrong to allow the landlord to raise the objection, and thus derive a direct benefit from his own tortious act—*Mason v. Fenn*, 13 Ills. 529.

Immediately upon the dissolution of the injunction the court proceeded to assess the damages, and awarded judgment in favor of the defendant for what the erections would be worth when taken down; that is, their value as old mate-

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rials. The statute provides that upon a dissolution of an injunction, in whole or in part, damages shall be assessed; but those damages have never been considered any other than such as arise out of the injunction proceeding itself. Thus, destruction of the property by fire whilst the injunction is pending (as in *Kennedy's adm'r v. Hammond*), expenses of the litigation, or any other loss or injury which the party has suffered by reason of the injunction, may be taken into the estimate in making the assessment of damages.

But the injunction does not change the title to the property, nor make the party suing it out liable as for a conversion. When the injunction was dissolved, the tenant still had a reasonable time within which to remove the property; and if he was obstructed by the landlord, a right of action would then accrue for the value of the materials. But in the first instance the landlord had the clear and undeniable right, after the determination of the character of the property, to elect to give up, instead of paying the money for it.

The court committed error in the assessment of damages, and its judgment is reversed and the cause remanded. The other judges concur.

Motion for rehearing overruled.



JAMES CLEMENS, JR., Respondent, v. OWEN MURPHY, Appellant.

1. *Landlord and Tenant—Improvements.*—It is not enough for the tenant to offer to fulfil the covenants of his lease so as to obtain permission from his landlord to remove the improvements he has erected upon the demised premises. He must first fulfil his covenants, and then he may have the legal right to remove his improvements without any permission.
2. *Judgment—Estoppel—Record—Evidence.*—The record of a judgment, in a former suit between the same parties, to constitute an estoppel, must show that the same subject matter had been passed upon and adjudicated in that suit.

*Appeal from St. Louis Court of Common Pleas.*

This was an action for rent and taxes under a lease from

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plaintiff to defendant. The lease expired January 1, 1854, but defendant held over to February 17, 1862, when he was dispossessed by law under a landlord's summons and judgment. By the terms of the lease under which defendant held over, the rent was \$500 per annum, payable monthly, and all State, county and city taxes. And it was further provided in said lease, that "at the end of the term for which this lease is made, all rents and covenants being paid and complied with on the part of the said Owen Murphy, he (the said Owen Murphy) shall have the right and privilege to remove any building or buildings he may have erected on the premises during the continuance of this lease." Lease dated February 1, 1844. Plaintiff claimed

|   |   |   |       |    |
|---|---|---|-------|----|
| State, county and railroad tax for 1860,  | - | - | \$126 | 79 |
| " " " " " 1861,   | - | - | 74    | 50 |
| City tax for 1861,  | - | - | 68    | 15 |
|   |   |   | \$269 | 44 |
| From which was deducted at the trial the railroad tax for 1860 and 1861, amounting to | - | - | 74    | 55 |
|   |   |   | \$194 | 89 |
| Rent for the months of October & November, 1860,                                      |   |   | 83    | 35 |
| Rent from March 1st, 1861, to February 17, 1862, when defendant was dispossessed,     | - | - | 430   | 56 |
|   |   |   | \$758 | 80 |

Defendant denied tax for 1861, alleging that he paid the tax for 1843 in 1844, by agreement with plaintiff, in lieu of those for 1861 at the termination of the lease; also denied the rent for October and November, 1860. but admitted the rent from March 1, 1861, to February 17, 1862.

Defendant set up a counter-claim for the value of the buildings—amount claimed \$1,500—and alleged that he had fully complied with all the conditions of the lease; that he was thereby entitled to remove the buildings, but that plaintiff refused to permit him to do so; that he only occupied after the termination of the lease until such time as he could obtain a settlement with the plaintiff or permission to remove the buildings, both of which plaintiff refused.



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Plaintiff, in his replication, denied the value of the buildings to be \$1,500 as charged by the defendant, or that defendant had fully complied with the terms and conditions of the lease, or that defendant had ever offered to make a settlement with him or asked permission of him to remove the buildings; that he (plaintiff) was compelled and did institute proceedings and dispossessed said defendant by law for failure to pay the rent.

By leave of the court first had and obtained, plaintiff filed an amended replication, denying that, by the terms of the lease, the defendant, at its expiration, or at any time since, was entitled to remove the buildings from said premises or to recover from the plaintiff the value thereof.

|  |   |   |   |       |    |
|--|---|---|---|-------|----|
| Trial by jury and verdict for          | - | - | - | \$836 | 85 |
| of which plaintiff remitted the sum of | - | - | - | 61    | 47 |

Amount of final judgment, \$775 38

On the trial, plaintiff read in evidence the lease; also the tax receipts (admitted to be genuine) for the amount of taxes as charged in the petition.

Amount of railroad tax included in the receipt of

|                            |   |   |   |   |   |      |         |
|----------------------------|---|---|---|---|---|------|---------|
| 1860,                      | - | - | - | - | - | \$44 | 75      |
| Do. do. for the year 1861, | - | - | - | - | - | 29   | 80      |
|                            |   |   |   |   |   |      | \$74 55 |

were withdrawn from the jury by the plaintiff at the trial.

John Vogel and J. B. Clemens, witnesses on the part of the plaintiff, proved non-payment of the rent for the months of October and November, 1860.

Plaintiff then read in evidence the transcript of the proceedings in the justice's court, from which it appeared that defendant was dispossessed from the premises February 17, 1862, for non-payment of rent due February 1, 1862, for the sum of \$541.66.

Defendant, on his part, read in evidence the record in a former suit brought by Murphy, the present defendant, against the present plaintiff for a balance on a note.

In this action, the present plaintiff (then defendant) filed

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an account in the way of a set-off, which account however embraced none of the items sued for in this action. It did, however, include three months' rent of the premises in question to March 1, 1861—being for December, January and February preceding.

Defendant then called plaintiff as a witness, and offered to prove by him that at the expiration of the lease the plaintiff owed him (defendant) a large sum of money, and would not settle with defendant because plaintiff could get a high rent from defendant; that defendant offered to pay all rent and taxes, and quit possession of the premises, provided plaintiff would allow him to remove the improvements; but plaintiff refused, and defendant, continuing in possession, refused to pay rent. All of which proof was excluded by the court, and defendant then and there excepted.

Witness testified that he did not recollect of any agreement with defendant that he should pay the taxes of 1843 in lieu of those of the last year of the demise, nor did he recollect whether or not the defendant had paid those taxes, nor could he say there was no such agreement, but his best recollection was that there was none.

This was all the evidence in the case.

The court, on its own motion, then gave the following instructions:

1. If in a former suit between these parties, in which Murphy was plaintiff and Clemens defendant, Clemens set up and was allowed a claim for rent for the months of December, January and February, and made no claim for the months of October and November preceding, the jury may presume that the rent for October and November had been paid; but the plaintiff may rebut that presumption by evidence which satisfies the jury that it had not been paid.

2. The plaintiff is entitled to recover the amount of rent for 11 months and 16 days, being from March 1, 1861, to February 17, 1862, as admitted by defendant's answer, together with such other items of plaintiff's demand as the jury may believe from the evidence he is entitled to recover

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upon, with interest on the whole amount from the commencement of the suit.

3. The jury are instructed that if they believe from the evidence that plaintiff paid certain taxes for railroad purposes, and for which payment railroad scrip was issued and delivered to the plaintiff, then plaintiff cannot recover for such sums, unless the jury believe from the evidence that he has tendered this scrip to defendant, or made the profert thereof here in court.

Defendant asked the following instructions and which the court refused :

1. The jury are instructed that if they believe from the evidence that in this court there was a former suit between the parties, but in which the plaintiff herein was defendant and the defendant herein was plaintiff; that in that former suit, to the declaration of plaintiff therein (defendant in this suit), defendant in that former suit (plaintiff in this suit) claimed as an offset four months' rent as due to him up to April 1, 1861, but that one month was withdrawn, and judgment was rendered between the parties up to March 1, 1861, then such judgment was conclusive between the parties as to the amount of rent due between the parties, and the jury will find accordingly.

2. The jury are instructed that if they believe from the evidence that there was a former suit between the same parties, and in which cause there was a claim for rent set up by the plaintiff in this cause against defendant, then the judgment in that cause is *prima facie* evidence of a settlement between the parties of all rent due by defendant to plaintiff up to the time of the institution of that suit; and if plaintiff claims that more rent was due to him than he claimed therein, the burden of proof devolves upon plaintiff to establish the fact, and the jury must find accordingly.

3. The jury are instructed that plaintiff is not entitled to recover of defendant for the taxes of 1861, if they believe from the evidence that the taxes of 1844 were, with the con-

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sent of plaintiff, paid by defendant in lieu of those which would accrue during the last year of the lease.

Defendant excepted to the ruling of the court.

The jury found a verdict for plaintiff, and defendant moved for a new trial.

*A. J. P. Garesché*, for appellant.

I. The former suit was a bar to the recovery of rent during October and November, 1860—1 Greenl. Ev. § 532; *id.* p. 663, n. 3; *Booge v. Pacific R.R.* 33 Mo. 212; *Wickersham v. Whedon*, 33 Mo. 561.

II. In a lease between the parties stipulating for the tenant the right to remove the improvements, he is authorized to recover their value—*Schlemmer v. North*, 32 Mo. 207.

III. Even viewed as a forfeiture, defendant would not be precluded from recovering the value of these improvements; for forfeitures are regarded as a security for the rent, and equity will relieve against them.

“There is a marked difference between a forfeiture imposed by statute and one arising under the contract of parties. In the one case it cannot be relieved against, in the other it may”—*Woodson v. Skinner*, 22 Mo. 23.

“Relief (in equity) is never denied where the breach is accidental and without fault, and admits of compensation.”—*Messersmith v. Messersmith*, 22 Mo. 373; 2 Sto. Eq. Jur. §§ 1313–16; 1 *Eden on Inj.* 41; *Tayl. on Land. & Ten.* 359, § 495; *Platt on Cov.* (1 Law Lib.) 91, § 206; *id.* on Leases, (2 Law Lib.) 477; *Rowston v. Burtley*, 4 Bro. C. C. 415; *Garner v. Hannah*, 6 Duer, 262, valuable for its review of the authorities; *Gorman v. Low*, Edw. Ch. 327.

That to restrain this well recognized practice of the courts of equity the statute of George IV. was enacted—*Platt on Cov.* (1 Law Lib.) 253, § 566; *id.* on Leases, (2 Law Lib.) p. 475.

Our own statutes embody a similar restriction (*Land. & Ten.* § 24, p. 1015), except against the class of cases pro-

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tested by sec. 25—this where the party proceeds under secs. 19–24 of that act. But as *expressio unius est exclusio alterius*, this sec. 24 does not apply to proceedings like those of plaintiff against defendant under secs. 33–35 of the same statute.

A. M. & S. H. Gardner, for respondent.

The evidence offered by the defendant was inadmissible and was properly excluded by the court. It would not have proved, nor did defendant pretend that he could prove, a legal tender, or an unconditional offer even, to pay or perform the covenants of the lease. If admitted it would have shown no legal or proper justification, and was therefore properly excluded—*Conrad v. Belt*, 22 Mo. 166; *Roussin v. Perpetual Ins. Co.*, 15 Mo. 244.

By the terms of the lease, the payment in full of all rent and taxes was a condition precedent to his right to remove, and it was therefore incumbent on the defendant to prove performance of this condition precedent before he could maintain an action and make any claim for damages against the plaintiff—2 Sto. Cont. § 978, p. 556; *Milldam Foundry v. Hovey*, 21 Pick. 439; *N. E. Worsted Co. v. Knight*, 2 Cush. 286; *Slocum v. Despart*, 8 Wend. 615; *Morris v. Sliter*, 1 Denio, 59; *Northrup v. Northrup*, 6 Conn. 296.

II. Judgments are not conclusive between parties except on matters directly in issue—*Ridgley v. Stillwell*, 27 Mo. 128; 1 Greenl. Ev. § 528; *Dunlap v. Edwards*, 29 Miss. (7 Cush.) 41. The matter must have been tried on its merits to make it *res adjudicata*—*Bell v. Hoagland*, 15 Mo. 360. The item of rent in this was not included in former suit, therefore not *res adjudicata*—*Edwards v. Ballard*, 14 La. An. 362.

Evidence may be given to show that the subject matter was not included in former judgment—*Badger v. Titcomb*, 15 Pick. 409; *Webster v. Lee*, 5 Mass. 334.

HOLMES, Judge, delivered the opinion of the court.

Two grounds of error are relied upon by the appellant for

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a reversal of the judgment. The one is the exclusion of testimony offered in support of his counter-claim. In the first place, this counter-claim is pleaded in an insufficient manner; in the second place, the evidence proposed to be offered does not appear to have been sufficient to establish any counter-claim at all. Under the lease, the appellant had the right to remove his buildings erected on the premises, at the end of his term, provided that all rents had been paid and all covenants complied with. The lessee offered to pay up all rents and taxes, and quit possession, if the lessor would allow him to remove his improvements; and it was proposed to prove that the lessor refused to accept this offer. This was not enough. He should have paid what was due and kept his covenants, and then he might have removed his buildings without any permission from the lessor; or if the lessor had interfered and converted the property to his own use, it is very probable that an action might have been maintained against him for their value. However this may be, we are of the opinion that there was no error in excluding this testimony.

The other error complained of consists in the refusal of an instruction to the effect that the record of a former suit between the same parties was conclusive of the matter of the two months' rent claimed in this suit for October and November. The record did not show that this same subject matter had been passed upon and adjudicated in that suit. The rent for these months does not appear to have been included in the account on which that action was founded, and there was some evidence on the part of the respondent tending to show that it had been omitted by mistake, and had not in fact been passed upon by the jury in that case. We think the instructions which were given by the court were correct, and that there was no error in refusing those asked for by the appellant.

As to whether or not the lessee may have a cause of action against the lessor for the value of his buildings, if they have been converted to his use, when he shall have fully performed

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the conditions of the lease on his own part, we do not undertake now to give any opinion.

The judgment here appears to have been given for the right party, and will be affirmed. The other judges concur.



MARY AND JOHN ARTHUR FANNING, BY PATRICK FANNING,  
THEIR NEXT FRIEND, Respondents, v. GODFREY VOELKER,  
Appellant.

*Landlord and Tenant—Assignee—Possession.*—The assignee of the landlord by deed may recover, under a landlord's warrant, possession of the premises demised upon making demand of the rent due and exhibiting to the tenant in possession the deed under which he claims title—R. C. 1855, p. 1018.

*Appeal from St. Louis Circuit Court.*

*Jecko & Clover*, for appellant.

*Cline & Jamison*, for respondents.

FAGG, Judge, delivered the opinion of the court.

A minute examination of all the points raised in this case is not deemed necessary; they seem to be rather technical than otherwise, and substantial justice between the parties does not require that they should be discussed at any considerable length.

This action was instituted before a justice of the peace in the city of St. Louis, under the provisions of the act relating to landlords and tenants—R. C. 1855, ch. 94. The property is described as lots 38, 39 and 40, situated on Hickory street in said city. Mary Fanning is alleged to be the owner of lot No. 38, and John Arthur Fanning, who is a minor and who sues by his next friend, Patrick Fanning, owns the remainder, the improvements being partly on both of the lots numbered 38 and 39. This case, in due time and by regular steps, passed from the justice's court to the Circuit Court for St. Louis in special term and thence to the general term,



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the judgment being for the plaintiff at each trial. It is now here by appeal. Upon the trial in the Circuit Court, a motion was made to dismiss the cause on account of the insufficiency of the complaint filed. This was overruled and excepted to ; but all that is really material in this motion may be noticed in considering the refusal of the court to give the instructions asked by defendant. No questions of law were raised and no exceptions taken to the testimony. At the conclusion of the plaintiffs' testimony, the counsel for defendant asked the court, sitting as a jury, to declare the law to be that plaintiffs were not entitled to recover upon the proofs made.

We think the court committed no error in refusing the instruction. The law only required that the plaintiff should show on the trial that "the party in possession rented or leased from a party claiming title to the premises by deed, and that the plaintiff has acquired the title of the original lessor by a deed or deeds regularly acknowledged."—R. C. 1855, p. 1018, § 40. The testimony of the plaintiffs, whether it amounted to positive proof of each and every one of these facts, is a matter of no consequence. It tended to prove all, and upon that the court found its verdict. It cannot be asked of this court to weigh the evidence. No proof was made by the defendant to controvert or vary the effect of any testimony offered by the plaintiffs. No witness was summoned in behalf of the defence at all, and there really seems to have been little or no controversy about the facts in the case. The testimony of John Knapp showed that the defendant was in possession under a lease from the parties that had owned the property at some time before it was conveyed to Knapp and Paschall and which had expired. The fair inference from his testimony, though not stated in so many words, was that it had been rented by them to the defendant again for a fixed sum. The defendant had admitted the amount of rent stated in the account to be correct, and the fact that the plaintiffs had acquired the title and that the defendants had notice of it could not be seriously questioned.

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The plaintiffs' deeds are not preserved in the bill of exceptions, but seem to have been before the court at the trial, as they were shown to one of the witnesses and identified as the same that were exhibited to the defendant when the rent was demanded of him. The fair presumption must be that they were regularly acknowledged and held to be sufficient by the court to prove the facts required by the statute.

The finding was for the right party, and the judgment will be affirmed. The other judges concur.



ROSANNA CALLAHAN, Respondent, v. MARINUS W. WARNE,  
JOSHUA CHEEVER AND MORTIMER N. BURCHARD, Appellants.

1. *Action—Negligence—Damages.* — No person can sustain an action for a wrong when he has himself consented or contributed to the act which occasioned his damage.
2. *Damages—Negligence—Action—Practice—Trials—Instructions.*—The existence of negligence is a fact to be proved, and for the jury to determine, when there is competent evidence tending to prove it; but the question, what facts and circumstances, being proved, amount to evidence of the existence of the main fact in issue, or tend to prove it, is a question of law. Where the evidence presented by plaintiff does not sustain the plaintiff's cause of action, it is the duty of the court so to instruct the jury.

*Appeal from St. Louis Circuit Court.*

*Krum, Decker & Krum*, for appellants.

I. The court below erred in refusing to give the first instruction asked by the defendants, namely, that upon the whole evidence the plaintiff was not entitled to recover.

This instruction was asked, at the close of the plaintiff's case, as in effect a demurrer to the evidence.

To make a *prima facie* case in this action, the plaintiff must have shown acts on the part of the defendants which led to the death of the plaintiff's husband, and that the latter could not have avoided his fate by exercising reasonable and ordinary care. The burden of proof was on the plaintiff—*Lane v. Crombie*, 12 Pick. 177.

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Assuming that the defendants were guilty of negligence, if the evidence showed that the plaintiff's husband was also guilty of negligence, and that the mutual negligence was the proximate cause of the injury, the instruction asked should have been given—*Trow v. Vt. Cent. R.R.*, 24 Vt. 487; *Williams v. Mich. Cental R.R.*, 2 Mich. 259; *Perkins v. Eastern R.R. et al.*, 29 Mo. 307; *Harrig v. N. Y. & Erie R.R.*, 13 Barb. 9; *Rathburn v. Payne*, 19 Wend. 399; *Boland et ux. v. Mo. R.R.*, 36 Mo. 484; *Boswell v. Flagler*, 5 Hill. 282; *Williams v. Holland*, 6 C. & P. 23.

Assuming that the defendants were negligent if the plaintiff's evidence showed that her husband failed to exercise ordinary care, the instruction asked should have been given—*Hill v. Warren*, 2 Stark. 377; *Holt v. Wilkes*, 3 B. & Ald. 304; *Jordin v. Crump*, 8 M. & W. 782; *Flower v. Adam*, 2 Taunt. 314; *Mench v. Concord R.R.*, 29 N. H. 9; *Mayer et al. v. Manntt*, 9 Md. 160; *Munger v. Tonawanda R.R.*, 4 Comst. 349; *Birge v. Gardiner*, 19 Conn. 507; *Neal v. Gilkett et al.*, 23 Conn. 437; *Lane v. Crombie*, 12 Pick. 177; *Smith v. Smith*, 2 Pick. 621; *Parker v. Adams*, 12 Met. 415; *Bens v. Housatonic R.R.*, 19 Conn. 566; *Harlow v. Henniston*, 6 Cow. 189-91; *Noyer v. Morristown*, 1 Vt. 353.

The plaintiff's evidence was all in one direction, proving the carelessness of Callahan and the appellants' innocence. The case comes within the rule of *Boland v. Mo. R.R.*, 36 Mo. 484, and the instruction should have been given—*Harris v. Woods*, 9 Mo. 112; *Lee v. Davis*, 11 Mo. 114; *U. S. Bank v. Smith*, 11 Wheat. 171.

II. The verdict of the jury should be set aside, because it is not supported by evidence.

Plaintiff's proof is merely circumstantial. The statute giving the remedy is essentially penal in its nature. Evidence introduced in an action under such a statute, and particularly circumstantial evidence, must be governed by the strictest rules controlling the admissibility of such evidence.

The verdict having been supported by no evidence, it should be set aside—*Heyneman v. Garneau*, 33 Mo. 565;

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Morris v. Barnes' adm'r, 35 Mo. 412; Nelson v. Boland, 31 Mo. 432.

*Bakewell & Farish*, for respondent.

I. The instructions refused were properly refused.

II. The instructions given correctly embodied the law of the case.

(Dixon v. Bell, 5 Maule & S. 198; Townsend v. Wathen, 9 East. 277; Bird v. Holbrook, 4 Bing. 628; Illott v. Wilkes, 3 B. & Ald. 304; Blackman v. Simmons, 3 Carr. & P. 138; Thomas v. Winchester, 2 Seld., N. Y., 407; Bush v. Brainard, 8 Cow. 78; Johnson v. Patterson, 14 Conn. 1.)

HOLMES, Judge, delivered the opinion of the court.

The plaintiff brings this suit under the provisions of the "Act concerning damages"—R. C. 1855, p. 647. The substance of the complaint was, that the defendants, carrying on the business of merchants in a general house-furnishing store in the building No. 125 North Fourth street, in the city of St. Louis, and whilst the plaintiff's husband was employed in repairing a sewer in the cellar of the building and was lawfully passing and repassing through the same in and about his business, negligently, carelessly and wrongfully placed three large jars in said cellar, two of them containing water and one containing a deadly liquid poison, which said jar of poison was of similar appearance to said jars containing drinking water, with no mark or notice to indicate its contents or warn persons that it contained poison, or that its contents was not the same as those of the two other placed beside it, and that by reason of said gross negligence and carelessness, and wrongful acts and default of the defendants, the plaintiff's husband, mistaking said poison for drinking water, then and there drank of the same, and was poisoned and immediately killed; and the plaintiff claimed damages to the amount of ten thousand dollars. (The statute limited the damages not to exceed five thousand dollars.) The answer denied that the deceased husband of the plaintiff

was employed by the defendants, or was there by their permission, or that they negligently and carelessly placed the jar of poison in the cellar without marks indicative of poison, as alleged, or by reason of their negligence the deceased drank of the poison.

At the close of the plaintiff's evidence the defendants asked the court to instruct the jury that the plaintiff was not entitled to recover on the case made. This instruction was refused. It was of the nature of a demurrer to the evidence, and will first be considered.

The facts shown by the plaintiff's evidence may be stated thus: that defendants were merchants carrying on business in this store rented from the owners, and that these three jars, the smaller one containing liquid *cyanate of potassium* and the two larger ones containing water, were used in the business for the purpose of cleansing and polishing silverware, and were usually kept in the cellar; that the jar containing poison was marked *poison*, in letters legible enough for any one to read who should look for a label, and had a *skull and cross-bones* emblems on the corner; that the deceased was employed, not by defendants, but by a contractor under an agent of the proprietors of the building, who had charge of repairs, and that they were allowed to pass through the store down into the cellar, through a basement and into an area, where a sewer was undergoing repairs; that when the work on the sewer began in the front area of the cellar, where stood a hydrant with a cup for drinking, these large earthen jars were standing against the wall of the basement, not far from the hydrant, but were removed out of the way of the workmen, before the deceased came into the cellar, by a person connected with the store, and taken into the basement part of the cellar and placed among some goods piled up there, a few feet to one side of the passage leading through the basement to the stairs which ascended into the store above, and where a laborer passing up and down about his business would not be likely to notice them particularly, unless he went out of his way to examine them; that the deceased had been en-

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gaged at first in carrying brick from the street, through the store and down into the cellar, but afterwards passed the brick through a scuttle in the sidewalk, but, being again sent up through the store to get a hatchet, and while going on this errand, and when he had got about the distance of one square from the store, he was observed to fall down sick, suddenly overcome, and died in an hour, with all the symptoms of death by poison.

It is plain from the evidence, though not clearly shown by the petition, that the defendants and the deceased stood in no particular relation, or privity, with each other, but were in the simple position of strangers. The case, therefore, must be considered as falling under the principle of the general maxim, *sic utere tuo ut alienum non lædas*. The cause of action is founded on alleged negligence of defendants, and the very gist of the action is that the negligence of the defendants caused the accident and produced the injury. The burden of proof is on the plaintiff, and if there be no evidence sufficient in law to make a *prima facie* case on this issue, plaintiff cannot be entitled to recover—Smith v. Hann. & St. Jo. R.R. Co., 37 Mo. 287; Boland v. Mo. R.R. Co., 36 Mo. 491.

It is to be observed, in the first place, that the evidence disproves a part of the allegations or assumptions of the petition. It not only fails to show that the deceased was employed by the defendants, or specially permitted by them to be there, or that he had any lawful occasion to meddle with those jars, or that the jars were placed in the cellar for any purpose of injuring trespassers or others, or were put where they were with any other reference whatever to the deceased than to place them out of the way of the workmen employed there, or that they were without visible marks indicative of poison, or that the deceased supposed the jars to contain water for drinking; but rather proves, or tends to prove, the direct contrary of all this.

The question to be determined is, whether as a matter of law, admitting all the facts and circumstances to be true



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which are by this evidence shown to have existed, there was such proof before the jury as would warrant them in referring the existence of the main fact in issue, namely, a negligence on the part of the defendants, which caused the accident and produced the injury; and there is involved in this inquiry a subordinate question of law, namely, the existence of negligence or unskillfulness on the part of deceased himself, being also the immediate and proximate cause of the accident and injury, which by ordinary care he might have avoided. If the evidence offered does not amount to any proof of such negligence on the part of the defendants, or if, showing some negligence on their part, having only a remote bearing on the accident, it does also amount to proof that the negligence of the deceased was the proximate cause of accident and injury, then no action could be maintained; for it is a settled principle of both English and American law, that no one can maintain an action for a wrong, where he has consented or contributed to the act which occasions his damage—*Broom's Max.* 170; *Trow v. Vt. Cent. R.R. Co.*, 24 Vt. 487.

The existence of negligence is a fact to be proved, and for the jury to determine, when there is any competent evidence tending to prove it. But the question, what constitutes that fact, in any given case? or rather, what other facts and circumstances, being proved, amount to evidence of the existence of the main fact in issue, or tend to prove it? is, and must be, a question of law. Negligence is a thing which by its very nature pertains to human conduct, and the action of the mind and will. It is a something, invisible, intangible, and for the most part incapable of direct proof, like sensible facts, or physical events. It is, in general, a matter of inference from other facts and circumstances which admit of direct proof, and which may raise a presumption of the truth of the main fact to be proved. These facts and circumstances must be such as would warrant a jury in inferring from them the fact of negligence, by reasoning in the ordinary way, according to the natural and proper relations of things,



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and consistently with the common sense and experience of mankind—1 Greenl. Ev. §§ 44, 48; *Smith v. Hann. & St. Jo. R.R. Co.*, 37 Mo. 292. A jury is not to be left or permitted to act or reason in any other way on such facts. Where it is plain that the jury could not find a verdict on the evidence offered without reasoning irrationally, against all ordinary common sense, and against all proper notions of justice and right, or against law, or without being influenced by undue sympathy, prejudice, gross mis-judgment or mistaken impression of the law and facts of the case, the court will declare, as a matter of law, that there is no competent evidence to be submitted to the jury. This rule was distinctly laid down in *Boland v. Mo. R.R. Co.*, 36 Mo. 491, and is too well established to require the citation of authorities. Whether there is any evidence, or what its legal effect may be, is to be declared by the court.

It has been decided, also, that it is proper for the defendant to take the judgment of the court on the plaintiff's evidence by an instruction of this kind. The plaintiff cannot be directly compelled to take non-suit; but if he will insist upon going to the jury, the court may instruct them, in such case, that there is no sufficient evidence before them to sustain the plaintiff's action, and that they will find a verdict for defendant—*Clark v. Hann. & St. Jo. R.R. Co.*, 36 Mo. 216.

With reference to the defendants, it appears that this poisonous liquid was intended for ordinary use in their business, and was kept in the cellar, where no other persons than those employed about the store were ordinarily permitted to go, or were in the habit of going. Where a man built a haystack of green grass near to another's land, knowing it would probably take fire, and saying he would take the chance, it was held that an action would lie, for he knew, or had reason to believe, it might do damage to his neighbor. Where a shopkeeper invited customers to his store and left a trap-door open where he might expect they would fall into it, that was held to be negligence. What reason had these defendants to expect that anybody would drink out of this jar? It was

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Callahan v. Warne et als.

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not placed there with a view to the injury of other persons, trespassers or otherwise, with or without notice of the danger. The cases of man-traps and spring-guns, therefore, afford little analogy and have no application here. It is said that instruments of danger are to be kept with the utmost care. This is an exception to the general rule under the maxim where only ordinary care is required of either party, and where the proper criterion is gross negligence, viewing conduct with reference to the caution of a prudent man. Of course, a careful and prudent man will be expected to take more care of things dangerous than of things not dangerous in their nature. There are not only different degrees of negligence, but it is always, in some measure, relative to the particular case. Where the utmost or greatest possible care and diligence are required, as in the carrying of passengers by the dangerous agency of steam, a learned judge has said that any degree of negligence might well deserve the epithet of *gross*; but even these cases must be considered with reference to the nature and peril of the business, and can scarcely mean anything more than such care, prudence and foresight as prudent and careful men may reasonably be expected to exercise in like cases and under like circumstances of danger—Sawyer v. Hann. & St. Jo. R.R. Co., 37 Mo. 260. In one of the examples usually given of this utmost care, Lord Denman said, "I am guilty of negligence in having anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third." He was speaking of the case of a man leaving his horse and cart in a street, where a child, playing about the cart, was injured by the starting of the horse by the aid of another person. Should a jar of poison be kept unlabelled, or in a place where it would be in any way probable that another person might mistake it for something else, it might well be deemed a want of the utmost care and gross negligence. But here this poison was kept where it would be extremely improbable that any person not acquainted with the use of

the jars would fall upon it, and the jar was marked with the signs of poison on the sides and cover in a way sufficient to warn any one but the most careless explorer of its dangerous character. It is not easy to imagine what greater care could reasonably have been required of these defendants, unless he were to lay down a rule that would absolutely forbid the use of such articles in any manner.

On the supposition that it would be a matter of fact of which the jury were to be left to judge, under all the facts and circumstances, whether the conduct of the defendants had been such as would ordinarily be expected of careful and prudent men in like case, and that the jury might, by any rational probability, have found that there had been some slight degree of negligence on their part, it is still perfectly clear, on this evidence, that any such negligence must have been, and was, only the remote cause of the accident and injury, and it is still to be considered what was the immediate and proximate cause of this very singular mischance.

It is evident that this laborer had no business to be meddling with those jars; that he must have turned aside out of his way to reach them; that he had a mere privilege of passing to and fro through the basement on this special occasion, and was a trespasser upon the property of another; that if he really drank of that poison (as would seem to be highly probable), he did so without the least examination for marks on the jar or on the cover; that there were marks on both, indicative of poison, and which would have been a sufficient warning for any one that had looked for them; that he might have avoided all danger by the exercise of that ordinary care which might reasonably be expected of any person of common sense and prudence in his situation; and, in short, that he was himself guilty of gross negligence and reckless imprudence.

It is suggested that he supposed the jars to contain water for drinking. The evidence affords no substantial grounds for this hypothesis, but rather shows the contrary. It distinctly appears that there was a hydrant standing in the area

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of the cellar, in full sight where the men were at work, with a drinking cup hanging near, where, if he had been thirsty for water, he might have drank in perfect safety. That he should pass by this hydrant, turn out of his way to explore the contents of these jars, select the smaller jar marked with the signs of poison, lift the cover with the emblems of death upon it, dip out or somehow get at the nauseous, stinking liquid, and actually mistake *cyanate of potassium* for a wholesome drink, is so extraordinary and unaccountable as to be almost inconceivable. The conclusion would seem to be irresistible, for one thing, that he must have been in search of something stronger than water and much in a hurry; and for another, that his own carelessness and imprudence were the proximate and real cause of the accident, and that he fell a victim to his own folly. Or, if it be imaginable that he was innocently looking for water, and proceeded with anything like ordinary care, his fate, however deplorable, would still have to be considered as no more than the result of pure accident or misadventure, where no greater blame was imputable to any other person than to himself. In either case no action can be maintained.

The result is that the plaintiff's evidence failed to make out a *prima facie* case of liability against the defendants, and the jury should have been instructed that the plaintiff was not entitled to recover.

Reversed and remanded. The other judges concurring.



CHAS. STEWART, Appellant, v. JONATHAN JONES, Respondent.

*Corporations — Franchise — Execution Levy.* — The franchise of a corporation cannot be levied upon and sold under execution.

*Appeal from St. Louis Court of Common Pleas.*

*Cline & Jamison*, for appellant.

*Hill & Jewett*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This is an action brought by the appellant against the respondent, asking that the respondent be enjoined and prohibited from using the franchise of Jones' Commercial College. A demurrer was sustained to the petition and the cause was appealed.

In 1849, the Legislature of Missouri incorporated Jonathan Jones and such associates as he might select for professors as a body corporate under the name of Jones' Commercial College, for the purpose of teaching the elementary and practical parts of mercantile and commercial education. Afterwards the appellant recovered judgment against Jones, and the sheriff, in pursuance of an execution issued on the same, levied upon certain property, including the franchise of the college, and at the sheriff's sale the appellant became the purchaser.

This proceeding is a novel one under our law. The act of incorporation does not authorize a sale of the franchise on execution; and as the franchise has no tangible or corporate existence, we do not see upon what principle it could be levied upon. It is not among the enumerated interests which are the subjects of levy and sale in the statutes under the title of Execution; and as it is entirely an artificial being, created solely for certain purposes, it cannot be seized, transferred, and used by others, without express proviso to that effect. The assets, goods, chattels and property of a corporation may be sold on execution so as to entirely arrest its usefulness or stop its operations; but the franchise is not a subject of sale and transfer unless the law by some positive provision has made it so, and pointed out the mode and method by which the sale and transfer may be effected—*Hall v. Sullivan R.R. Co.*, 21 Law Rep. 138; *State v. Roes*, 5 Ired. 306; *Arthur v. Com. & R. B. of Vicksburg*, 9 Sm. & M. 431.

Judgment affirmed. The other judges concur.

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Lamothe et ux. v. Lippott.

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JOSEPH LAMOTHE AND JOSEPHINE LAMOTHE HIS WIFE, Plaintiffs in Error, v. JOHN C. LIPPOTT, Defendant in Error.

*Estoppel—Record—Judgment—Administration—Evidence.*—Parol evidence is not admissible in a collateral suit to contradict the records of the Probate Court, showing that the lands of an intestate had been sold to pay debts.

*Error to St. Louis Land Court.*

*Morehead*, and *Krum & Decker*, for plaintiffs in error.

*Gardner*, and *Cline & Jamison*, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

The main and important question we understand to be the ruling of the Land Court in refusing to admit testimony to prove that Therèse Beron at the time of her death owed no debts. The record from the Probate Court shows that after the death of Therèse Beron the public administrator of St. Louis county took charge of her estate, and gave the proper notice of the fact as required by law; that an inventory and appraisement of the effects were made, and that accounts were presented and allowed against the estate for an amount greatly in excess of the value of the personal property. The administrator then presented his petition to the court praying for the sale of the real estate to pay the demands proved up against the estate, and the prayer of the petition was granted and the order of sale made. It is admitted that notice of publication was regularly given and published of the sale, that the sale was made by the administrator and properly approved by the court, and that one John C. Marine became the purchaser, from whom the defendant in this suit derives his title by conveyance. To avoid the effect of the sale and conveyance, and show title in the plaintiff, an attempt was made to prove that the intestate Therèse owed no debts at the time of her decease, and that the Probate Court, in making the order and approving the sale, acted without jurisdiction.



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This evidence was rejected. It is contended that the evidence was legitimate for the purpose for which it was offered, and to support this position the case of *Farrar et al. v. Dean*, 24 Mo. 16, is mainly relied upon. But that case is no authority in this, and does not give the slightest countenance to the doctrine contended for. It is not analagous in any point or particular. There the owner of the lot died leaving no debts; letters of administration were taken out, and not a single debt was ever allowed and proved up against the estate; costs accrued in consequence of the administration, and the property was sold to pay the expenses incurred by administering, and it was decided that the statute only provided for the sale of real estate to pay debts; and as there were no debts, the whole proceeding was an error. It was evident that the administration was initiated, undertaken, and carried on, with a view of obtaining title to the property, and not to subject it to any rightful or lawful claim; and as it was conducted without authority of law, it was extrajudicial and void from the beginning. But quite different is the case under consideration: debts were regularly presented, allowed, and classified; and the personal property being insufficient for their satisfaction, resort was had to the realty according to the method prescribed by law.

The record shows that the Probate Court had full jurisdiction, and the presumption is in favor of its proceedings, and it is not competent to attack the record by parol in this collateral manner. If the allowances were procured by fraudulent and false means and pretences, unjustly, and to the injury of the estate and the parties interested, a court of equity, on a proper showing of the facts, might afford a remedy; but in a proceeding wholly collateral a party cannot be permitted to introduce oral testimony to falsify the record, when it plainly appears that the court whose record is thus sought to be impeached had jurisdiction.

Judgment affirmed. The other judges concur.



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Soulard v. City of St. Louis.

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JAMES G. SOULARD, Respondent, v. THE CITY OF ST. LOUIS,  
Appellant.

*Limitations—Accruing of Action—City of St. Louis.*—Under the provisions of the charter of the City of St. Louis (February 23, 1853), providing for the condemnation of property for streets and alleys, where the title to the land taken for a street was in dispute between parties, no cause of action accrued against the city for the damages assessed until the question of title was determined by a court of competent jurisdiction in favor of the claimant.

*Appeal from St. Louis Circuit Court.*

A. W. Alexander, for appellant.

R. M. Field, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This case was before this court on a previous occasion, and will be found reported in 36 Mo. 546. After it was remanded to the court below, the plaintiff filed an amended petition, in which it was stated that plaintiff was owner in fee of the eastern part of the Mackay tract; that proceedings were instituted by the city in 1853 for the condemnation of the land necessary for opening Jackson street through plaintiff's said land; that the land belonging to the plaintiff taken for said street was appraised by the jury at \$8,056, and that the jury awarded that of the whole land damages the city should pay \$2,028.12, and individual property owners, for benefits, the sum of \$7,189.88; that the mayor of the city, in February, 1854, rendered judgment against the property owners, assessed for benefits, issued executions, and actually collected \$6,857.95, which was paid into the city treasury; that at the time of the condemnation the land in question was in litigation, being held by parties adversely to the plaintiff; that the title was adjudged in favor of the plaintiff at the April term of the United States Circuit Court, 1857; that the tenants then submitted and gave up the possession to the plaintiff. The petition demanded judgment for the amount awarded by the jury, and interest.

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Soulard v. City of St. Louis.

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The defendant answered, denying all information or knowledge sufficient to form a belief, and setting up the statute of limitations as a defence.

The evidence fully sustained every material averment or allegation contained in the amended petition, and the court, sitting as a jury, gave judgment for plaintiff.

The only question upon which issue was taken was the statute of limitations, and it will be wholly unnecessary to examine the instructions, as they were directed solely to that point.

This suit was originally instituted November 3, 1859, and the money received by the city from the parties assessed for benefits to pay land damages for opening Jackson street was received in the spring or summer of 1854. A little over five years had intervened between the reception of the money and the time of commencing the suit. If at the time the city received the money the plaintiff had been possessed of an absolute and unquestioned title, there would have been some reason for urging the statute as a bar ; though, considering that the city merely held the money in the attitude of a trustee, for the benefit of the party legally entitled, we express no opinion now as to whether the statute would be an available defence. The proceedings were had under the amended charter of the city, approved February 23, 1853, the sixth clause of the third section of which provides in cases of condemnation, that "if the title of the property proposed to be condemned is in controversy, nothing shall be paid therefor until the right to the money, ascertained by the verdict of the jury, is determined by the judgment of a court of competent jurisdiction, in a suit between the parties respectively claiming the same," and "during such controversy the money shall remain in the city treasury." At the time the city collected and received the money into the treasury the plaintiff was disabled, according to the above law, from obtaining it, for his title was in dispute, and it was not till a final adjudication took place in his favor in the United

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States Circuit Court that the disability was removed and he was free to prosecute his action. From the time of the judgment rendered in the Circuit Court his right of action accrued and not till then, and his suit was commenced within less than three years from the rendition of the same.

It is further contended for the city that the amended petition introduced a new cause of action, and that the statute should be applied from the date of the amendment which was made March 5, 1866. This objection was not well taken and cannot be allowed. The claim was for the same thing in both instances, only different standards of evidence were introduced.

The petition as originally filed claimed the reasonable value of the land, to be ascertained by testimony; the amended petition claimed the value of the same land at the amount ascertained by the jury when making the assessment on the proceeding for condemnation. The difference is rather of form than substance, and there can be no doubt but that a judgment on either the original petition or the amended one would be a complete bar to any further proceedings on the other. They are in no sense two separate and distinct causes, in which the statute would be a bar against one, and saved as to the other.

The judgment will be affirmed. The other judges concur.

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RUSSELL H. WESCOTT, Appellant, v. RICHARD F. BRIDWELL, ALFRED GRABLE, HENRY L. CLARK, ROBERT M. RENICK, FREDERICK SCHULENBERG, AND ADOLPHUS BRECKLER, Respondents.

1. *Mechanics' Liens—Practice—Set-off.*—In a suit to enforce a mechanic's lien by a subcontractor, the contractor is the principal debtor who is to defend the demand of the plaintiff, and may plead as against him a set-off or counter-claim.
2. *Practice—Supreme Court—Judgment.*—The Supreme Court may affirm a judgment as to some of the parties, and reverse it as to others.

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Wescott v. Bridwell et als.

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*Appeal from St. Louis Land Court.*

*P. C. Morehead*, for appellant.

*E. C. Kehr*, for respondent.

FAGG, Judge, delivered the opinion of the court.

This was a proceeding instituted in the Land Court for St. Louis county in accordance with the provisions of an act entitled "An act for the better security of mechanics and others erecting buildings, or furnishing materials for the same, in the county of St. Louis."

No declarations of law were asked, and no objections made at the trial to the introduction of testimony.

We think there was no sufficient reason for the granting of a new trial, and the only question that need be discussed at all is the alleged irregularity of the judgment.

Wescott, the plaintiff below, claimed to be a subcontractor under the defendants Bridwell & Grable for work and labor done and materials furnished in and about the erection of a house the property of the other defendant, Clark. Judgment by default was taken against the defendants Grable and Clark for failure to answer, but was not further prosecuted as to either.

The other defendant, Bridwell, filed his answer denying the truth of the account sued upon, and setting up an offset, to which plaintiff replied.

Upon the issue thus presented the parties went to trial, which resulted in a verdict for the defendants for \$397, and judgment was entered accordingly.

The argument of counsel for the appellant is based upon the idea that the owner of the property to which the lien attached was in reality the debtor, and the contractors (at whose instance and request the work was done and the materials furnished) were merely his agents. It is insisted, therefore, that a demand due to the contractors, or either of

them, was not properly the subject of a set-off against the plaintiff's claims.

The former adjudications of this court upon that point seem to be overlooked, as no reference was made to the cases in which it arose. In *Wibling v. Powers*, 25 Mo. 599, the cause had been dismissed as to the contractor, treating him as a mere nominal party to the record, and judgment taken against the owner of the property alone. The court unhesitatingly held this to be erroneous. Judge Scott, in delivering the opinion of the court, says, "The contractor is the only person who can contest the validity of the demand; and as the proceeding was dismissed as to him, there was no person to defend the claim of the plaintiff. This case is as if a creditor, proceeding by attachment and garnishment, should dismiss his suit against the defendant (the debtor), and afterwards take steps against the garnishee, when there could be no judgment which he could be condemned to satisfy."

The same point arose in the case of *Ashburn v. Ayres*, 28 Mo. 75. The decision in the former case was cited as a correct settlement of the question and the contractor held to be the real debtor, whilst the position of the owner of the building was in some respects analagous to that of a garnishee in a suit by attachment.

The irregularity of the judgment is not a sufficient ground for its reversal. This court has the power, upon the record before it, to make the judgment conform to the issues tried in the cause; and it will therefore be affirmed as to the matters in issue upon the answer and reply, and reversed and the cause dismissed as to the other defendants.

Judgment will therefore be entered for Richard F. Bridwell for the sum of three hundred and ninety-seven dollars, and for his costs. The other judges concur.

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Frei v. Vogel.

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GEORGE FREI, Appellant, v. JOHN C. VOGEL, Respondent.

*Replevin—Bond—Damages—Practice.*—A party who makes himself the principal in a replevin bond, although not the plaintiff in the suit, will be liable to have judgment entered against him as principal. A stranger taking the property out of the hands of the sheriff by an action for the delivery of personal property, will be liable, if he fail to show title, for the whole value of the property taken out.

*Appeal from St. Louis Circuit Court.*

*E. C. Kehr*, for appellant.

*Krum, Decker & Krum*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This was a suit brought by the plaintiff against the defendant, who was sheriff of St. Louis county, under the statute for the claim and delivery of personal property.

It appears from the record that Julius Winkelmeyer recovered judgment against John Wagner, and that execution was issued on said judgment and placed in the hands of the defendant, and that he levied upon and seized a team, consisting of a wagon, two horses, and a set of harness, found in the possession of Wagner, to satisfy the execution. After the levy and seizure, the plaintiff claimed the property as his, and instituted proceedings in the Circuit Court, in conformity with the statute, to obtain possession of the same. Upon his giving bond, the court made the necessary order, and the property was delivered to him. A trial was had before a jury, and, after hearing the evidence, the jury declared by their verdict that the pretence of title set up to the property by the plaintiff was fraudulent, and that it was *bona fide* the property of Wagner. The jury found the value of the property to be \$350, and also assessed damages in favor of defendant for the sum of \$50. All the damages were remitted, and the court rendered judgment in favor of the defendant, and against the plaintiff and the securities on his bond, for

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Frei v. Vogel.

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the sum of \$350, the value of the property, which was not sufficient to pay off and satisfy the execution. All the evidence offered was admitted and all the instructions asked were given on both sides, and no exceptions were taken to any ruling of the court.

It is objected that the judgment is erroneous because it was entered against one Jamm, who is alleged to have been the agent of the principal, as well as the principal and the sureties on the bond. The bond is executed with Jamm as principal and two other persons as sureties, and he does not purport to act as agent, but binds himself expressly as principal.

The statute enacts that if the plaintiff fails to prosecute his suit with effect, and have the property in possession, the court or jury shall assess the value of the property, and that judgment shall go against the plaintiff and his securities. This is predicated on the supposition that the plaintiff will generally be on the bond as principal, but there is nothing exonerating another person from liability if he sees proper to bind himself personally as a principal. It is perhaps sufficient to say that Jamm did not appeal from the judgment, and no very cogent reason is perceived why the plaintiff should be more solicitous about his interests than he appears to be himself.

It is further objected that the assessment was erroneous, being for the value of the property, when it should only have been for the interest of Vogel, he not being the real owner. Vogel had a special interest in the property, and the plaintiff was an entire stranger to it, as was conclusively found by verdict. Vogel was then entitled to the whole value, and he was answerable to Winkelmeyer, the plaintiff in the execution, for the amount—*Dilworth v. McKelvey*, 30 Mo. 147; *Fallon v. Manning*, 35 Mo. 271.

Judgment affirmed. The other judges concur.



HENRIETTA MEYER, Respondent, v. THE PACIFIC RAILROAD,  
Appellant.

1. *Practice—Supreme Court—Evidence.*—Where there is a total failure of evidence tending to prove the issue, the court may determine the whole case as a matter of law; but where there is presented legal evidence tending to prove the issue, the jury must determine what weight shall be attached thereto.
2. *Action—Damages—Negligence.*—The court cannot single out an isolated fact, and instruct the jury as a matter of law that it amounts to negligence. Whether the action of the conductor of a railroad train in putting a party off the cars while moving very slowly, under all the circumstances of the case, amounted to negligence, was a question for the jury to determine. Whether the intoxication of the party injured contributed to the injury or not, was also a matter to be left to the jury.
3. *Practice—Instructions.*—Where the court refuses instructions as prayed, but gives them in a modified form, the party asking the instructions may treat them as refused, and save his exceptions.

*Appeal from St. Louis Circuit Court.*

This was an action by Henrietta Meyer, widow of August Meyer, deceased, against defendant, for damages for the death of her husband. The action was instituted under the second section of the "Act relating to damages," R. C. 1855, ch. 147. The accident occurred at the depot of defendant at St. Louis. The Franklin accommodation train was at the station. For some time (15 or 20 minutes) before the train started, the deceased had been about the depot platform intoxicated. When the train started, Meyer was standing upon the rear platform of the baggage car, leaning against the baggage car door. The proof showed that the notice about riding on the platform was posted up on the outside of the cars instead of the inside; that there were three passenger cars in the train, and that there was a large number of vacant seats; that the conductor gave the signal to start from station platform, and as the train started, moving very slowly, he stepped on the platform where Meyer was; that the train had not moved more than thirty or forty feet from the

place of starting before the signal had been given to stop ; that Meyer was under the cars fatally injured.

The plaintiff's evidence tended to show that the conductor, in attempting to put him off, either by criminal intent or carelessness, forced him between the cars.

The defendant's evidence tended to show that he fell from the cars from the simple shock of starting the train, his drunken condition rendering him unable to stand up, and that the conductor attempted to save him.

The plaintiff requested the court to give the following instructions :

1. If the jury believe that August Meyer exercised ordinary care and prudence on his part, and that the injuries from which he died resulted from or were occasioned by the negligence, unskillfulness or criminal intent of the officers, agents, servants or employees of the defendant, or any one of them, whilst engaged in running the locomotive and train of cars mentioned in the petition ; and further find that the plaintiff Henrietta Meyer was the wife of said August Meyer at the time of the latter's death, the jury will find for the plaintiff and assess her damages at five thousand dollars.

2. If the jury believe from the evidence that the conductor Darby was about to put Meyer off the cars, it was his duty first to stop the train before attempting to do so.

Both of which the court gave as asked, to which defendant excepted.

And the defendant thereupon asked the court to instruct the jury as follows :

1. If the jury believe from the evidence that deceased received the injuries complained of through his own want of ordinary care and prudence, plaintiff cannot recover.

2. In order to entitle the plaintiff to recover, it is incumbent on her to show that the injuries complained of were occasioned by the negligence, unskillfulness or criminal intent of the officers, servants or employees of defendant whilst

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Meyer v. Pacific R.R.

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running, conducting and managing their locomotive and train of cars, without any fault on the part of deceased contributing thereto.

3. Even if the jury believe that the officers and employees of defendant were guilty of slight negligence whilst running, conducting and managing the train in question, yet if they find also that the want of ordinary care and prudence on the part of deceased directly contributed to occasion the injuries complained of, plaintiff cannot recover.

4. If the jury find that deceased was thrown from defendant's cars and thereby killed by reason of his voluntarily taking a dangerous and improper place or position on defendant's car, when it was practicable to get into a safer and securer place or position within the same, then the defendant is not liable in this action.

5. If the jury believe that the deceased, at the time he received the injuries complained of, had voluntarily placed himself on the platform of one of defendant's cars, and that he was thrown therefrom by a sudden jerk or movement of the train while in motion, whereby he received the injuries complained of; and that such jerk or movement was not such as to increase the danger or risk to persons within the cars, and that defendant had provided ample room for passengers within the cars, they must find for defendant.

Which instructions were given.

Defendant also asked another instruction, (No. 6—see opinion,) which the court refused to give as asked, but gave it after having interlined the same, to which interlineation the defendant excepted.

*Leighton with Glover & Shepley*, for appellant.

*Woerner & Kehr*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

There are two grounds urged in this court for a reversal of the judgment: first, that there is not sufficient evidence to support the verdict; and secondly, the court improperly

instructed the jury for the respondent. The doctrine is so well established that it is hardly necessary to repeat it, that this court will not disturb a verdict because it is against the weight of evidence.

Where there is a complete and total failure of evidence, and it has no tendency to prove the issue, the court will be warranted in determining the whole case as a question of law; but where there is any evidence conducing to support the issue, or prove the allegations made by the pleadings, it is for the jury to say what weight shall be attached to it. It must be apparent at first blush that the jury have been actuated by prejudice or misconduct, and that their finding is wholly unsupported by the facts in the case, before we have liberty or authority to interfere. This doctrine is so firmly embedded in our jurisprudence, that to hold otherwise would be judicial usurpation, and the unsettling of well established principles. The constitution and laws of the country have imposed upon juries peculiar duties, and, unless they grossly abuse their trust, this tribunal is not to invade their province and revise their work. Their opportunities for judging of the capacity, integrity and credibility of witnesses by seeing them face to face, and observing the manner of giving their testimony, make them possess advantages which we are deprived of. There is not such an absolute failure or want of evidence in this case as would justify us in interposing for that reason.

The second instruction given for the respondent tells the jury, that if they believe the conductor was about to put Meyer off the car, it was his duty first to stop the train before attempting to do so; and as all the evidence shows that when the supposed attempt was made the train was not stopped, it was equivalent to withdrawing the whole question of negligence from the jury, and instructing them to find for the respondent. From the evidence, it appears that the train was just starting, and going at a remarkably slow rate of speed; and if an attempt was made to put Meyer off, it was a fact that should have been submitted whether it was done

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negligently, or in a way to endanger life. To attempt to put a person off of a train when it is under full headway, or in the night at a dangerous place, would unquestionably be deemed gross carelessness and highly improper conduct, and a court would be fully warranted in so declaring it; while expelling a man when the cars were scarcely in perceptible motion might be devoid of all hazard and without any negligence. Therefore it is a question for the jury to determine, with a full view of all the circumstances as shown by the facts, and the court cannot single out an isolated fact and instruct that it amounts to negligence as matter of law.

All the instructions asked by defendant were given except one, which will presently be noticed, and no complaint is alleged against them. The first one given for the appellant is not liable to any objection so far as we can see. After the regular series were given on both sides, the defendant asked the court to instruct, that

6. If the jury believe that at the time deceased received the injuries complained of he was so intoxicated as to be unable to exercise the care and prudence ordinarily exercised by prudent and sober men while travelling upon railroads, and that such inability on his part contributed to cause the injuries aforesaid, plaintiff cannot recover.

The court refused to give it in that shape, but interlined it, and then gave it, making it read, that

6. If the jury believe that at the time deceased received the injuries complained of he was so intoxicated as to be unable to exercise, *and did not exercise*, the care and prudence ordinarily exercised by prudent and sober men while travelling upon railroads, and that such inability and want of care on his part *directly* contributed to cause the injuries aforesaid, plaintiff cannot recover.

To this action of the court in making the interlineation the plaintiff excepted.

Parties have the right to present such instructions as they see proper, and it is the duty of the court to either give or refuse them, without making any alteration or modification

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whatever. It is the privilege of the party to stand or fall by his own proposition, in the shape he has chosen to offer it; and if the court dissents from it, it has but one course of action to pursue, and that is to refuse it without qualification. The conduct of the court, therefore, in this case must be regarded as a refusal to give defendant's instruction; and the giving of the one in its modified form as of its motion.

In our opinion, the court stated the law correctly. Unless Meyer's intoxication directly contributed to cause the injury, and in consequence thereof he did not exercise ordinary care and prudence, we do not see how it should be made to operate to the detriment of the plaintiff. The very proposition is monstrous, that because a man is drunk, although that is not the proximate cause of the injury, he is therefore placed beyond the pale of legal protection and may be killed with impunity.

The second instruction given for the plaintiff is erroneous, and on that account the judgment is reversed and the cause remanded. The other judges concur.

Judge Holmes concurs in reversing the judgment, but not in all the reasonings of the court.

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JOHN WEBSTER AND JAMES MOIR, Plaintiffs in Error, v. JACOB CANMANN AND WALTER RANSOM, Defendants in Error.

1. *Evidence—Res Gestæ.*—What the defendants said in relation to their having paid an account presented to them, is part of the *res gestæ* when testimony is given of the presenting the account and of the defendants' refusal to pay.
2. *Practice—Depositions—Trials.*—Exceptions to questions and answers, made during the taking of a deposition, must be presented to the court and passed upon at the trial. The whole deposition cannot be excluded because part of the testimony is objectionable.

*Error to St. Louis Circuit Court.*

C. D. Coleman and J. Niel, for plaintiffs in error.

Cline & Jamison, for defendants in error.



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FAGG, Judge, delivered the opinion of the court.

Some objection has been made by the counsel for the plaintiffs in error to the instructions given in this case, but we fail to find anything of a contradictory character in them. The suit was instituted in the Circuit Court for St. Louis county upon an account for \$254.25. The petition averred that it was due and owing to the plaintiffs, who were co-partners doing business under the name and style of Webster, Moir & Co. The answer simply denied that plaintiffs were the only members of said firm, and averred a payment in full of the amount sued for. These two issues, we think, were fairly presented to the jury upon the instructions, and it only remains to notice the various objections made to the ruling of the court in relation to the admission of testimony.

One Thomas Webster was introduced as a witness on the part of the plaintiffs, who testified substantially that he was the agent of the plaintiffs and had the general supervision and management of their business at the time the different articles in the account were sold and delivered to the defendants, and that at or about a certain date he presented the same for payment. Upon a cross-examination, the court permitted the witness to state what was said by the defendants in reference to their having paid or settled it. It is insisted that the court committed error in permitting this to be done. It was a part of the *res gestæ*, and we think the defendants were entitled to the full benefit of all that transpired on that occasion in reference to the account. The witness had stated in his examination in chief that the account was due and unpaid, and that when presented by him for payment it was refused. The defendants were at liberty to show what was said in reference to the refusal.

L. A. Benoist was called by the defendants for the purpose of impeaching the witness Thomas Webster. This witness was permitted to state what the general character of Webster was, having first made the following statement: "I know his (Webster's) general character, but cannot separate my own opinion concerning him and my own knowledge from



his general character." There is evidently no difference between his opinion and personal knowledge, on the one hand, and the general character of Webster, on the other. The foundation for the answer to the question put to him would not have been properly laid if it had consisted only of his own knowledge, and it was unnecessary to have made that statement; but concurring as it did with his knowledge of the general character of the person, no error was committed in permitting him to answer as he did.

Several other questions of minor importance are discussed in the counsel's brief; we do not consider it necessary to notice them in detail. It may be remarked generally, in reference to the depositions read by the defendants, that whilst objections were properly made to many of the questions and answers at the time they were taken, there was no effort to exclude such portions from the jury at the time of the trial, and it is now too late to complain. Such objections are not sufficient to exclude the entire deposition from the jury. It would still have been competent to read the unobjectionable portions after the balance had been stricken out.

We come now to consider the only question that presents any difficulty in the case. The court permitted the defendant Canmann to be sworn for the purpose of laying the foundation for the introduction of the deposition above referred to. It is insisted that this was a fact in the cause that could only be proved by a witness competent to prove any fact material to the issues, and that, being a party to the record, he is excluded by the express provisions of the statute. It is admitted that, under an application of the strict rules of the common law, he would be held to be incompetent for that purpose. But we do not feel that the ends of justice require such a rigid and strict adherence to those rules in a case like this. It is a mistake to say that this is a fact to be proved with the same degree of certainty that should attach to a matter material to the issues involved in this cause. It is not addressed to the jury, and would by no possibility af-

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fect the conclusions at which they arrived, but was addressed to the court. It was simply an effort on the part of the defendants to show why it was that they were entitled to this secondary class of evidence, by showing that the witness himself was beyond the reach of the process of the court. In perhaps a large majority of cases such a fact does not admit of positive proof, and the most that a party can do is to make out a *prima facie* case by showing such facts and circumstances as the court may deem necessary and proper for that purpose. A court is not without some degree of discretion in matters of this sort, and although it is not affirmatively shown that the facts stated by the party were peculiarly within his knowledge, yet the reasonable presumption would be that the court availed itself of the best evidence that the nature of the case admitted of. At all events we should not feel authorized to reverse the judgment in this case, and send it back for further trial, unless it could be shown from the record that manifest injustice had been done by the verdict of the jury. We conclude, upon an examination of the whole matter, that the verdict was for the right parties and ought not to be disturbed.

The judgment will therefore be affirmed. The other judges concur.



AUGUSTUS A. BLUMENTHAL, Appellant, v. JOSEPH TORINI,  
Respondent.

*Practice—Trials—Jury—Supreme Court.*—It is the province of the jury to decide upon the credibility and weight of testimony; and where evidence is presented legally tending to support the issues, the Supreme Court will not review the finding of the jury.

*Appeal from St. Louis Law Commissioner's Court.*

J. N. Straat and J. G. Beal, for respondent.

N. A. Mortell, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The only question of law preserved by the record in this

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case is the refusal of the court below to give the third and fourth instructions asked by the appellant. The instructions are inconsistent with themselves, and both are erroneous; they are inapplicable to the issue as presented by the petition and the evidence as detailed in the cause.

We cannot enter into an examination of the weight of evidence; that is peculiarly for the jury. Whether we would have drawn the same inferences, or rendered the same verdict, is not the question. There was conflicting testimony, and in such a case, aside from the impropriety of our interposing, it would be obviously impossible for us to form as correct and intelligent a conclusion as the jury, who have the witnesses before them, and can judge of their credibility by the manner in which they detail their evidence, their apparent candor or attempts at suppression, and general opportunities for knowing what they depose to. There is not an absence of evidence to support the verdict, and unless we knew the credibility to be attached to the respective witnesses, (and so far as the record discloses they are all equally unimpeached,) we should have difficulty in telling on which side the weight preponderates. There is nothing here warranting an interference in this court.

Judgment affirmed. The other judges concur.

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JAMES P. LANGFORD, FANNY B. STEPHENSON (EXECUTRIX OF JAMES N. STEPHENSON, DEC'D), JACOB GRIMM, AND HENRY GRIMM, Respondents, v. LORENZO P. SANGER, HART S. STEWART, JAMES S. SANGER, J. A. HENRICKS, ERVIN CAMP, WILSON KING, WILLIAM KELLY, WILLIAM TRUESDAIL, AND WILLIAM GALLAGHER, Appellants.

1. *Practice—Pleading—Causes of Action.*—Where no legal cause of action against the defendants is set forth in the petition, the judgment will be arrested.
2. *Practice—Pleading—Surplusage.*—Damages naturally follow the breach of a contract, and the setting forth of the specifications of the evidence is faulty and vicious pleading. A petition to recover damages for breaches of a contract, should set out the contract, and then assign the breaches thereof.

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*Appeal from St. Louis Court of Common Pleas.*

The amended petition was as follows :

“Plaintiffs state that they as partners, doing business under the name and style of Langford, Stephenson & Co., entered into a contract or articles of agreement, in writing, with the above named defendants, doing business under the name and style of Sanger, Camp & Co., on the sixth day of February, eighteen hundred and fifty-five, for the framing and erection of fifteen bridges upon the Illinois division of the Ohio and Mississippi railroad, as follows : that is to say, on section 84, Nicholson creek, one bridge, 40 feet span and 90 degrees angle ; on section 87, Brush creek, two bridges, each 60 feet span and 90 degrees angle ; on section 89, Bear creek, one bridge, 40 feet span and 90 deg. angle ; on section 94, Sennway creek, one bridge, 30 feet span and 90 degrees angle ; on section 96, Sennway creek, one bridge, 30 feet span and 90 degrees angle ; on section 101, Shephard river, one bridge, 40 feet span and  $68\frac{1}{2}$  degrees angle ; on section 106, branch of Muddy, one bridge, 40 feet span and 90 degrees angle ; on section 109, Lambert’s branch, one bridge, 30 feet span and 56 degrees angle ; on section 111, Gardner river, one bridge, 40 feet span and 90 degrees angle ; on section 113, Sandy branch, one bridge, 40 feet span and 90 degrees angle ; on section 122, Bompas creek, one bridge, 60 feet span and 90 degrees angle ; on section 126, branch of Mud creek, one bridge, 40 feet span and 90 degrees angle ; on section 129, Mud creek, one bridge, 60 feet span and 90 degrees angle ; and on section 135, Indian creek, one bridge, 60 feet span and 90 degrees angle. That by the terms of the said contract the said defendants, as such company, bound themselves to deliver the materials for the erection of said bridges at the end of the track of said railroad for such a number of said bridges as might be most convenient for them, the defendants, or at the bridge sites, and also to pay the plaintiffs the cost of all necessary transportation of materials for the erection of said bridges, and also to pay the plaintiffs the

sum of six dollars per lineal foot (lineal measure) for the framing and erection of the said bridges, within twenty days after the monthly estimates should be rendered by the engineer in charge of the said railroad, first reserving ten per cent. of each estimate made as aforesaid, as security for the completion of the plaintiffs' part of the said contract; —that the plaintiffs bound themselves by the said contract to frame and erect the said bridges according to the plans and specifications to be furnished by the division engineer of said road, for the price aforesaid; and to take the materials for said bridges at the end of the track of said road, and to transport the same to the sites of the said bridges for the actual cost of the transportation, for so much of the materials for the erection of the said bridges as might not be otherwise delivered; and to erect the said bridges in advance of the laying of the tract of the said road, so that the same should not be delayed by the non-erection of the said bridges.

"Plaintiffs further state that in pursuance of their part of the said contract they actually framed and erected the said bridges according to the plans and specifications furnished them by the engineer in charge of the said division of the said railroad, and that the framing and erection of the said bridges at the prices agreed upon by the plaintiffs and defendants, as expressed in said contract, amounted in the aggregate to the sum of four thousand two hundred and ninety dollars (\$4,290), the said plaintiffs having framed and erected seven hundred and fifteen lineal feet of said bridges, as will appear by reference to the final estimate of the said works done by the plaintiffs in and about the framing and erection of the said bridges made by the engineer in charge of the said division of the said road, a copy of which estimate is filed and marked with the letter 'A.' The contract or article of agreement above referred to is herewith filed and prayed to be taken as a part of this petition, and marked with the letter 'B.'

"And the plaintiffs further state that they were delayed in the prosecution and completion of the said contract for

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the framing and erection of the said bridges by the failure of the defendants to furnish the materials for the same as they were bound by their part of the said contract to do; and that in consequence and by reason of said delay the plaintiffs were compelled and actually did pay, lay out and expend the sum of five hundred and fifty-four dollars and fifty cents to hands employed by the plaintiffs in the prosecution of said work, including twelve dollars and fifty cents paid by the plaintiffs for the board of said hands while so delayed with said work, upon which said sum of five hundred and fifty-four dollars and fifty cents the defendants are justly entitled to a credit of eighty-four dollars and three cents, leaving a balance of five hundred and seventy dollars and forty-seven cents due to the plaintiffs for the damages sustained by the plaintiffs by reason of the delay occasioned as aforesaid, the particulars of which will appear in an account thereof herewith filed, for which sum of four hundred and seventy dollars and forty-seven cents the plaintiffs ask judgment.

“And the plaintiffs further state that by reason of the delay in the prosecution of said work caused by the defendants failing to furnish the materials for the same, as they were bound by their part of said contract to do as aforesaid, the plaintiffs were further damaged in the penal sum of eighty-four dollars, accruing to the plaintiffs for and on account of the time lost by Henry Grimm, one of said plaintiffs, who had the actual management and overseeing of the hands while employed in the framing and erection of said bridges, for which sum of eighty-four dollars the plaintiffs also ask judgment.

“And the plaintiffs further state that the defendants owe them eighty-seven dollars and seventy-five cents for money paid by plaintiffs for the transportation of material used in framing and in the erection of said bridges, which sum of eighty-seven dollars and seventy-five cents was the cost of the necessary transportation of iron material used in the erection of the said bridges, the particulars of all which will ap-



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pear in account thereof herewith filed ; for which sum of eighty-seven dollars and seventy-five cents the plaintiffs ask judgment, that being the amount due them by the terms of said contract, the same being the actual cost of transportation of material used in the erection of said bridges.

"The plaintiffs further state that defendants owe them the sum of one dollar for money paid by plaintiffs for defendants, at their request, for welding an iron bolt of the plaintiffs, for which plaintiffs ask judgment.

"Plaintiffs further state that the said defendants actually paid them for and on account of framing and erection of the said bridges the sum of fourteen hundred and thirty-nine dollars and forty cents (\$1,439.40) in part payment for the framing and erection of said bridges, leaving the sum of two thousand eight hundred and fifty dollars still due to the plaintiffs for the framing and erection of said bridges, for which sum the plaintiffs ask judgment together with interest.

*Sharp & Broadhead*, for appellants.

*Davis & Evans*, and *Garesché*, for respondents.

WAGNER, Judge, delivered the opinion of the court.

The question arising in this case grows wholly out of the defectiveness of the petition. It is inaccurate to speak of the several parts in which the petition is divided as separate and independent counts ; the relief prayed for in each and every one of them flows as damages out of the contract attempted to be pleaded in what is designated as the first count. The counts amount to nothing more than the evidence which the pleader has illogically inserted in the petition, and by which he intended to support his action, and which might be wholly disregarded and treated as surplage had the written contract been well set out and declared upon.

Damages naturally follow the breach of a contract, and the setting forth of the specifications of the evidence is faulty and vicious pleading.

There is no cause of action charged in the petition, the



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Ryan v. Spalding et als.

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avermment of performance by the plaintiffs is insufficient, and there is no allegation whatever of a breach by the defendants. Had the contract been properly declared on, and the breaches assigned, all the subsequent parts of the petition might have been rejected, and evidence would still have been admissible to enable the plaintiffs to recover whatever damages they had sustained in consequence of the non-performance by the defendants; but as no legal cause of action is stated, the motion in arrest of judgment should have been sustained.

The second instruction given by the court of its own motion is unexceptionable; the first is subject to some criticism, which can be obviated on a new trial.

The judgment is reversed and the cause remanded, with leave to the plaintiffs to amend their petition. The other judges concur.



JOHN B. RYAN, Plaintiff in Error, *v.* JOHN W. SPALDING, ADOLPHEMIA W. SPALDING, AND CYRUS G. HOYT, Defendants in Error.

*Practice—Trials—Instructions.*—To authorize the giving of instructions there must be evidence upon which they can be predicated.

*Error to St. Louis Circuit Court.*

*Davis & Evans*, for plaintiff in error.

*Cline & Jamison*, for defendants in error.

FAGG, Judge, delivered the opinion of the court.

This was a suit instituted in the St. Louis Circuit Court to recover the amount of three notes and interest alleged to have been executed by the firm of Joseph C. Yates & Co. and payable to the order of plaintiff; also the sum of one hundred and five dollars, paid by plaintiff to the use of said firm. It is alleged that the firm of Yates & Co. really consisted of one John W. Spalding and his wife Adolphemia, the interest of Yates being very small, and in point of fact

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transferred before the commencement of the suit to one Hoyt as trustee for Mrs. Spalding, and who was also made a party defendant. The object of the petition seems to have been to charge the separate property of Mrs. Spalding with the payment of these debts. The allegations of the petition were specifically denied, and the cause was tried by the court sitting as a jury.

The plaintiff asked two declarations of law, both based upon the hypothesis that the business of this firm was really carried on with the money of Mrs. Spalding, and that she was liable for the payment of the sum demanded. The court refused to make the declarations asked for, and the plaintiff submitted to a non-suit.

Passing over any other question that might arise upon the case as it is presented here, it is sufficient simply to say that the evidence was not sufficient to authorize the instructions. Previous to the trial the suit was dismissed as to Yates, who was introduced as a witness on the part of the plaintiff. His testimony failed to make out any case upon which the instructions could have been predicated.

The other judges concurring, the judgment will be affirmed.

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NIMROD SNYDER, Respondent, v. MAURUS RAAB, Appellant.

1. *Practice — Witness — Striking out Answer.* — Under the provisions of the statute, R. C. 1855, p. 1577, § 4, if a party summoned as a witness fails to appear to testify, his answer or petition may be stricken out and judgment rendered accordingly.
2. *Practice — Ejectment — Judgment — Execution — Error.* — Although the description of the land in a judgment in ejectment be so vague that the officer cannot execute the writ of possession, that will not be a ground for reversal of the judgment in the Supreme Court.

*Appeal from St. Louis Circuit Court.*

This was an action in ejectment brought in the St. Louis Circuit Court to recover possession of a piece of land described as "fifty acres of land of that tract or parcel of land

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situated and being in the county of St. Louis and State of Missouri, in U. S. survey 3094, in township 6 north, range 5 east, and containing five hundred and ten acres, more or less; bounded on the west by Crève Cœur lake, on the north by land formerly belonging to Mullanphy, east by land formerly owned by Olley Williams, and south by Crève Cœur lake," &c.

*Peacock & Cornwell*, for appellant.

*Krum, Decker & Krum*, for respondent.

FAGG, Judge, delivered the opinion of the court.

The respondent Snyder instituted suit in the St. Louis Land Court to recover possession of a tract of land containing fifty acres, and described as being included within a larger tract, a general description of which was given. The defendant (appellant here) answered, denying generally the allegations of the petition. The plaintiff caused the defendant to be subpœnaed as a witness in his behalf, and, failing to appear and testify at the trial, the court, on motion, struck out the answer and proceeded to give judgment for the plaintiff. There was a motion for a new trial and also in arrest of judgment, which being overruled, an appeal was taken to the general term of the St. Louis Circuit Court. The judgment being there affirmed, the case is brought to this court by appeal.

The court was sufficiently authorized, upon the failure of the defendant to appear and testify at the trial, to reject—or, what amounts to the same thing, to strike out—the defendant's answer—R. C. 1855, p. 1577, § 4. There is nothing to show that there was anything harsh or improper in the action of the court in this matter, and we cannot interfere with it. The plaintiff chooses to stand upon the judgment as it was entered up for him, and the defendant is in no condition to complain. If the plaintiff has a judgment that cannot be executed, the defendant cannot set up that fact here as a ground of reversal.

The judgment is affirmed. The other judges concur.

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Garesché v. Deane.

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ALEXANDER J. P. GARESCHÉ, Respondent, v. JOHN DEANE,  
Appellant.

*Practice—Supreme Court.*—Verdict for the right party.

*Appeal from St. Louis Court of Common Pleas.*

*Knox & Smith*, for appellant.

Respondent, *pro se*.

FAGG, Judge, delivered the opinion of the court.

This was an action brought in the St. Louis Court of Common Pleas to recover one thousand dollars alleged to be due the plaintiff for professional services. There was a verdict and judgment for the amount claimed, and the case is brought here by appeal. To defeat the plaintiff's recovery in the court below, the defendant offered in evidence a letter from Garesché to Deane, enclosing a bill for the services in question amounting to five hundred dollars.

William T. Mason, Esq., who was the associate counsel in the case in which the services were rendered, was introduced by plaintiff in rebuttal. He said: "Mr. Garesché, when he wrote the letter introduced in evidence, said he would take \$500, but thought it was worth \$1,000; but he finally agreed to take \$500. I was then the attorney for Mr. Deane, and in some things acted as his agent." This testimony was objected to, and really constituted the only ground upon which a reversal of the judgment is asked. If these statements should be entirely excluded in this case, it would make but little difference in the result; we cannot see, therefore, how the defendant could have been prejudiced by the admission of this testimony. The general principle upon which the objection was made is correct, but, as there was abundant evidence in the cause to support the verdict, we must conclude that the finding of the jury was for the right party, and the verdict ought to stand.

Judgment affirmed. The other judges concur.

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Exchange Bank v. Cooper.

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THE EXCHANGE BANK OF ST. LOUIS, Defendant in Error, v.  
WILLIAM G. COOPER, Plaintiff in Error.

1. *Practice—Trials—Instructions.*—The court should give or refuse the instructions asked by counsel in the language in which they are prayed. A modification made in an instruction asked is equivalent to a refusal of the instruction as prayed.
2. *Attachment—Residence—Domtcll*—A party may have a residence in one State, while his family may dwell in another State.

*Error to St. Louis Circuit Court.*

*Russell & Goff*, for plaintiff in error.

The refusal of defendant's instructions was error; for, to constitute defendant's declarations matter of estoppel *in pais*, it must have appeared—1. That they were inconsistent with the fact sought to be proved, viz., that he was a resident; 2. That they were made wilfully and with intent to induce plaintiff to believe he was a non-resident; 3. That they were sufficient to induce a reasonable man to believe it; 4. That plaintiff did believe it, and, relying on it, instituted suit; 5. That she would have been injured by allowing proof of plaintiff's evidence.—*Pickard v. Sears*, 6 Ad. & El. 469; *Freeman v. Cook*, 2 Exch. Rep. 654; *Brown v. Wheeler*, 17 Conn. 345; *Parker v. Barker*, 2 Metc. 423; *Danforth v. Adams*, 29 Conn. 107; *Hill v. Epley*, 31 Penn. 331; *Cuttle v. Brockway*, 32 Penn. 45; *Benbocker v. Okeron*, 36 Penn. 519; *Eldrid v. Hazlitt's adm'r*, 33 Penn. 307; *Boggs v. Mercer Mining Co.*, 14 Cal. 279–366; *Taylor et al. v. Ely*, 25 Conn. 251.

To make defendant's answer to questions matter of estoppel, it should be shown what those questions were, and that defendant knew the object of them, and that his answers would be relied on.—*Hackett v. Callender et als.*, 32 Vt. (3 Shaw,) 97.

*Glover & Shepley*, for defendant in error.

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Exchange Bank v. Cooper.

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FAGG, Judge, delivered the opinion of the court.

The record in this case presents but few questions for consideration. It is brought to this court by writ of error to the St. Louis Circuit Court. The Exchange Bank instituted a suit by attachment against Cooper, plaintiff in error, to recover a balance which was alleged to have been overdrawn on his account with the bank. The ground of the attachment stated in the affidavit was that Cooper was a non-resident of the State. The return of the officer showed that he was personally served, and the defendant appeared in proper time and filed his plea in abatement, which was tried by the court sitting as a jury.

The defendant asked the court to give four declarations of law. The first two were given with certain additions attached to them by the court upon its own motion, and the third was refused altogether; to all of which exceptions were duly taken at the time. The fourth was given in the shape it was asked.

Defendant's second declaration is as follows: "2. Though the evidence shows that defendant, at the time the attachment was sued out, had a wife living outside of the State of Missouri,—if the fact is also proved that he had previous to that time separated from his said wife, and was at that time living separate from her and keeping house and doing business in the State of Missouri, and slept and made his home at his said house and place of business, he was in contemplation of law a resident of this State, and plaintiff cannot recover on the plea in abatement"—to which the court added of its own motion the following—"unless defendant had represented himself to plaintiff to be a non-resident."

The action of the court in this matter is to be taken as a refusal of the instruction, so far as the defendant is concerned, and as giving it upon its own motion. This practice was condemned by this court as improper in the case of *Meyer v. Pacific Railroad*, decided at the present term (p.

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Exchange Bank v. Cooper.

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151, *ante*). The law was correctly stated, and the instruction should have been given as asked by the defendant.

For some reason unexplained by the record, a witness, introduced by the defendant to prove defendant's residence in the State, had been interrogated by the court as to the fact of his having a wife living outside the limits of the State. The answers to these questions account for the theory upon which this instruction was drawn. This witness stated that defendant resided in and kept a store at the city of St. Louis at the time of the commencement of this proceeding, and that he had so resided and carried on his said business for a period of more than two years previous thereto. This witness was not contradicted or impeached by any other witness in the case.

Robert E. Carr, the cashier of the bank, and upon whose affidavit the writ of attachment was issued, was the only witness introduced on the part of the plaintiff. He testified as follows: "I know defendant; have known him in St. Louis about twelve months; he was in St. Louis on the 16th day of December, 1864. I had reason to believe he resided in Wisconsin previous to coming here. I believe he lived here on the 16th of December last. \* \* \* He was doing business as a substitute broker in St. Louis, and had an office," &c. In reference to a conversation which he had with the defendant just previous to the institution of the suit, as witness says, "to ascertain from him where he resided, he told me he resided in Wisconsin at the beginning of the war; he had enlisted in the army in Wisconsin, and was here on furlough, and was in the United States military service in some capacity, probably recruiting." He could not have been a substitute broker and a recruiting officer for the army at the same time; but at all events he was living at St. Louis "on the 16th day of December, 1864," in the language of the witness, that being the day on which the writ was issued.

The witness was recalled by the plaintiff at a subsequent part of the trial, and, after repeating substantially his con-



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versation with defendant, says, "this induced me to believe that he was a non-resident, and I got out the attachment under this impression."

The only proof, then, in the case of the fact of defendant being a non-resident was an inference drawn from the statements of the defendant. This was not sufficient to authorize the declaration of law given for the plaintiff. It was to the effect that defendant, by admitting that he was not a resident of the State, and that the plaintiff being thereby induced to institute this proceeding against him, he was estopped from denying such admissions on the trial.

For the giving of this instruction, and also for its erroneous action in relation to the second instruction asked by defendant, the judgment of the Circuit Court must be reversed and the cause remanded. The other judges concur.

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WILLIAM BOSBYSHELL, Respondent, v. SUMMERS & HERRON, Appellants.

*Practice — Default — Negligence—New Trial.*—To authorize the setting aside of a judgment on account of the want of defence at the trial, the defendant must show that all due diligence has been used by himself and his attorneys.

*Appeal from St. Louis Law Commissioner's Court.*

This was an action instituted in March, 1865, against appellants for four hundred dollars, for injuries done to plaintiff's carriage by the careless and negligent driving of a dray by defendants. The answer was a general denial, and alleged that the accident occurred by plaintiff's neglect. Upon the trial, defendants not appearing, the plaintiff called and examined several witnesses, and the court rendered judgment for plaintiff for four hundred dollars.

Afterwards defendants filed a motion to set aside the judgment and grant a new trial, for the reasons—1. Because defendants have a full and meritorious defence to the action

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Bosbyshell v. Summers et al.

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of plaintiff; 2. Because the clerk, in making up the docket, failed to place the names of defendants' attorneys on the same, and the cause was therefore overlooked by said attorneys; 3. Because said attorneys, some two weeks before the trial, sent defendant Summers to the clerk's office to inquire when said case was set for trial; that said Summers did inquire at the office, and was told it was set for the 15th of August, and so reported to his attorneys; 4. For the reasons set forth in the accompanying affidavits.

Appellants then filed the following affidavits in support of said motion:

L. M. Shreve, sworn, says: "At the commencement of the present term of court, I examined the docket of cases due to the 15th of August, and overlooked the case of Bosbyshell v. Summers & Herron as my name was not marked on the docket to this case. I did not observe the name of Mr. Sanders marked, and, though examining with reference to this and the causes, failed to notice it. Affiant states he believes defendants have a good defence to this action and has so advised them, and therefore prays the court to set said default aside that they may make the same.

Daniel Summers on his oath says, that some two weeks ago he called at the office of Shreve & Sanders, his attorneys in the above case, and was sent by them to the office of the Law Commissioner's Court to inquire when the said case would be called up for trial; that he went to the said clerk's office and inquired of a person who seemed to be the clerk, and was informed by him that the case of Bosbyshell v. Summers & Herron would be tried on the 15th of August, and that relying on said information he so reported to his said attorneys, and that this is the reason he was not present at the trial. He further states that he has a complete and meritorious defence to the action of plaintiff, which he will make if a new trial be granted.

The following affidavits were filed against the motion:

William C. Huffman, clerk of the said court, on his oath saith, that no person ever made inquiry of him as to the set-

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ting of the above entitled cause; that he did not give any incorrect information to said Summers as to the trial day of said cause, and did not tell him that the same was set for the 15th of August; that the docket of the present term has been set since the 24th day of July, 1865, giving the names of parties and attorneys and date of trial, and accessible to attorneys and parties; that if any inquiry had been made of him, he would only have answered the inquiry by first looking at the docket or index, and could not and did not inform any person that said cause was set for trial for any other day than the day for which it was originally set, viz., the 10th of August, 1865.

William Herthel, the deputy clerk of the court, says that he wrote the docket of cases for the present term, and wrote the name of Mr. Sanders, as attorney of defendants, opposite the name of defendants, as the same now appears; that the said docket has been set since the 24th of July, 1865; that he has no recollection of any person inquiring of him about the setting of said cause at this term; that it is his invariable practice when such inquiries are made, to refer the parties to the docket itself, or to examine it himself, or the index, before answering such inquiries; that from this invariable practice he is confident that he never gave said Summers any incorrect information about the trial day of said cause at this term, and that he never informed him that the case was set for any day other than the day for which it was originally set, viz., the 10th day of August, 1865.

The defendants' motion for a new trial was thereupon overruled, and defendants excepted, and this was the only exception taken through the whole proceeding.

*Krum, Decker & Krum*, for respondent.

I. The appeal in this case is transparently frivolous, and the judgment ought to be affirmed with ten per cent. damages. The appellants have presented nothing here for review except the refusal of the court to set aside the judgment and grant a new trial.

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II. The defendants, by the affidavits, show that by their own neglect and the neglect of their attorneys they omitted to attend at the trial, and for that reason it would have been error for the lower court to grant them a new trial—Boernstein v. Heinrichs, 24 Mo. 26; Jacob v. McKean, 24 Mo. 40 (Shreve, att'y); Stout v. Calvert, 6 Mo. 254; Steigers v. Darby, 9 Mo. 679; 19 Mo. 151.

III. *A fortiori*, the defendants before they appealed knew that this court had firmly established the rule not to interfere with the discretion of the trial court in refusing to set aside a default, unless the trial court grossly abused this discretion—Florez v. Uhrig, 35 Mo. 519, and cases there cited.

IV. The case then shows (a) palpable neglect of the party in the lower court; (b) an appeal made August, 1865, and a failure to file the transcript before the 21th of October—long after the appeal was returnable; (c) a failure to assign errors up to this trial, 23d November, 1866; and, finally, no merits in the record.

Respondent submits that ten per cent. damages ought to be awarded upon the affirmance.

*Shreve & Sanders*, for appellants.

WAGNER, Judge, delivered the opinion of the court.

The affidavits filed on both sides show that the appellants and their attorneys were guilty of the most culpable neglect in failing to advise themselves of the time the cause was set for trial, and in not appearing to attend to it at the trial day. Under the established practice of this court, there is nothing to justify a reversal of the judgment. No steps have been taken to prosecute the appeal, nor has there been any assignment of errors filed.

Let the judgment be affirmed.

The other judges concur.

CHRISTOPHER W. SPALDING, Appellant, v. ADOLPHUS MEIER,  
JOHN C. RUST, AND THEODORE G. MEIER, Respondents.

*Practice—Entries—Attorneys.*—It is the duty of attorneys to see that the proper entries of the action of the court are made by the clerk. Where the attorneys had agreed that a motion for new trial should be continued until the next term, and so stated to the court, which did not dissent, and subsequently the motion was called up and overruled; and the plaintiff, at the next term, filing a motion, based upon affidavits setting forth the facts, to set aside the entry overruling the motion and to have the proper entry made,—the Supreme Court directed the entry to be set aside as irregular, on the ground that the hearing of the motion had been continued, and ordered that the entry of continuance should be entered *nunc pro tunc*, and that the motion should be regularly heard.

*Appeal from St. Louis Law Commissioner's Court.*

*R. L. Farnsworth*, for appellant.

*A. M. Gardner*, for respondents.

HOLMES, Judge, delivered the opinion of the court.

This is an appeal from the Law Commissioner's Court, not taken at the same term at which the final judgment was rendered. It appears that at the next term afterwards the plaintiff's attorney filed a motion, supported by his own affidavit, praying the court to set aside the entry of record of the previous term overruling the motion for a new trial, for the reason that it had been agreed between counsel that the motion should stand continued to the next term, with leave to file affidavits in support of it; that this understanding was announced in open court, and that the court did not dissent, and that the attorney of the plaintiff went away supposing it had been continued, but there was no entry by the clerk of the continuance; and when afterwards, at the same term, the motion came up for a rehearing in the absence of the plaintiff's counsel, it was overruled, and so entered. This application was overruled, a bill of exceptions filed, and an appeal taken to this court at the second term.

If there had been no irregularity in the record entries of the previous term or in the action of the court, or if it were merely a case of negligence on the part of the attorney, there would be no ground on which the court below could have been required to grant this motion, or on which this court could interfere for his relief. The court below does not appear to have been satisfied that there was any such irregularity as would justify it in granting the application. The affidavit does not go so far as to say that the court had expressly directed a continuance of the motion, but only that the judge did not dissent to the arrangement the counsel had made. Attorneys should be a little more certain of the action of the court, and ought to see that the proper entries are made by the clerk. The facts stated on the affidavit are not denied by the other attorney. It would seem to be very probable that the misunderstanding arose from the failure of the clerk to enter the continuance as agreed upon. The plaintiff's attorney may be considered as having been in some fault that he did not furnish the clerk with a memorandum of the entry to be made, or, at least, see that the proper entry was made; but it can hardly be said that there was such negligence in this that the rights of the party represented ought to be sacrificed. For the opposite party to insist upon an advantage gained in this manner would nearly amount to a fraud upon his adversary. It was said in *Stout v. Lewis*, 11 Mo. 438, that "surely, the neglect of the counsel of the party against whom the judgment was rendered, should not have induced the court to let the opposite party perpetrate a gross fraud."

We think it may fairly be inferred that a continuance of the motion was granted, and that the entry of the continuance was omitted by mistake or oversight. In such case, the overruling of the motion for a new trial, at the same term, may be deemed an irregularity, contrary to the rules and practice of the court, on which a writ of error *coram nobis* would lie, and an error which the court could correct

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at a subsequent term, or an irregularity, as distinguished from an erroneous final judgment—Stacker v. Cooper Circuit Court, 25 Mo. 401; Doan v. Holly, 27 Mo. 256.

The plaintiff appears to have had a meritorious cause of action. The court had instructed the jury that, on the evidence before them, the plaintiff was not entitled to recover. We think the evidence was sufficient to make out a *prima facie* case for the plaintiff, and that this instruction was erroneous. Not to grant a new trial, or to overrule this application for a hearing on his motion for a new trial, would be to deprive the party of all remedy. Under the special circumstances of the case, we think the purposes of justice would be answered by setting aside the entry of the overruling of the motion for a new trial at the preceding term, and directing an entry of a continuance *nunc pro tunc*, and allowing the motion for a new trial to come to a hearing.

Judgment reversed, and the cause remanded. The other judges concur.



HARRY NORDMANSEER, Appellant, v. BUEL T. HITCHCOCK, Respondent.

1. *Practice—New Trials—Neglect—Attorneys.*—The Supreme Court is never inclined to interfere with the discretion of the inferior courts in their action in refusing to grant new trials, unless a strong case is made out showing a palpable abuse of a sound discretion, and where the injustice complained of is not traceable to the negligence of the party. Where a cause is regularly docketed and set for trial, it is no excuse for the party who has suffered, that his attorney was absent, or did not attend to the suit.
2. *Practice—Error—Supreme Court.*—For error apparent upon the face of the record, the Supreme Court will reverse a judgment, although the party complaining of the judgment has failed to present his exceptions properly.
3. *Practice—Trials—Non-suit—Proviso.*—Where the defendant answers and pleads a set-off and counter-claim, he cannot, if the plaintiff fail to appear at the trial, take a verdict and judgment for the amount of his set-off and counter-claim. The proper judgment is that of non-suit of the plaintiff, or a dismissal of his suit.



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*Appeal from St. Louis Circuit Court.*

*Cline & Jamison*, for appellant.

I. "Where the party or his counsel are absent through misapprehension or necessity, and the cause goes to the jury undefended, and there are merits, the court will relieve by setting aside the verdict"—1 Gra. & Wat. New Trials, 162; Rex v. Tracy, 2 Strange, 1208; Schenck v. Woolsey, 3 Cai. (N. Y.) 100; 2 Salk. 645; Beazley v. Shapleigh, 1 Price, 201; Peebles v. Ralls, 1 Litt. (Ky.) 24; Sayer v. Finck, 2 Cai. 336; Sherrard v. Olden, 1 Halst. (N. J.) 344; Stewart v. Dunett, 3 Mon. (Ky.) 113; Honoré v. Murray, 3 Dana, 31; Turnr's adm'r v. Hooker, 2 Dana, 334.

*Sharp & Broadhead*, for respondent.

I. The action of the court was correct in trying the case when called for trial. The plaintiff waived a trial by jury by failing to appear at the trial, and defendant submitted it to the court.—R. C. 1855, p. 1261, § 14.

II. The motion for new trial was not filed in time to be entertained or heard by the court. Section 6 of R. C. 1855, p. 1286, is imperative that all motions for a new trial, and in arrest of judgment, shall be filed within four days after the trial, if the term so long continue; and if not, before the end of the term. The motion should have been therefore overruled, and might have been stricken out.

III. Under any view of the question, this court will not interfere with the exercise of the discretion of the court below, even if it could be claimed that it was a matter of discretion with that court.—Allen et al. v. Brown, 5 Mo. 327; Jacobs v. McLean, 24 Mo. 40.

WAGNER, Judge, delivered the opinion of the court.

This was an action instituted for the purpose of recovering judgment against the defendant for an amount of money which the plaintiff alleged he had over-paid on a contract for the sale and delivery of corn. The defendant in his answer

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denied that he owed plaintiff anything, but averred that he had not received all that was due for the corn delivered, and claimed the balance due him as an offset; and also stated that he had been damaged to the amount of \$5,000 by reason of the plaintiff refusing to take the corn according to the contract, which had depreciated in value and deteriorated on his hands, which latter sum he pleaded as a counter-claim. The petition was filed and the writ made returnable to the September term, 1865, of the St. Louis Circuit Court, which commenced on the last Monday in the month, and the answer and counter-claim of the defendant was filed on the 2d day of October next succeeding. On the 7th day of November, 1865, plaintiff was permitted to file his replication without objection, the cause was regularly set for trial, and when it was called the plaintiff did not appear; the defendant announced himself ready, and the court, upon hearing the proof adduced, gave judgment for defendant for the full amount asked in his set-off and counter-claim. On the 15th of December thereafter, plaintiff filed his motion for a new trial, supported by the affidavit of Mr. Mills, his attorney, which motion was overruled by the court, and an appeal prayed for and allowed.

The only question made is whether the court abused its discretion in not granting a new trial. The affidavit of Mills, which accompanied the motion for a new trial, states that he was taken ill about the middle of September, 1865, and from that time till the 26th day of October was confined to his room, a portion of the time to his bed, and was wholly unable to attend to business; that after the last day mentioned he was able to attend to very little business; that while he was ill in his room he requested Mr. J. C. Dodge, a member of the bar, to visit Mr. Sharp, the defendant's attorney, and request additional time to file a reply on account of illness. Mr. Dodge called at the office of Mr. Sharp, and, not finding him in, stated the fact to the person in charge of the office, who replied that of course such a request would be granted as an act of common courtesies between members

of the bar ; that he supposed nothing more would be done with the case until he had recovered, and that it would not be set for trial ; that when he was able to attend to his business a portion of the time, he put in his reply, and employed the services of Mr. Dodge as attorney, and sent him twice to examine the legal docket to see if the cause was set for trial, and after examination Mr. Dodge reported that it was not ; that relying on this information as correct, and having previously supposed that nothing would be done until his recovery, he remained ignorant of the fact that it was set for trial and was not present when it was called. He further states that the plaintiff is a non-resident and had entrusted the entire management of the case to him, and that he believed plaintiff had a meritorious cause.

This court is never inclined to interfere with the discretion of the inferior courts in their action in refusing to grant new trials, unless a strong case is made out showing a palpable abuse of a sound discretion, and where the injustice complained of is not traceable to the negligence of the party asking us to intervene. When a cause is regularly docketed and set for trial, it is no excuse for the party who has suffered that his attorney was absent or did not attend to it—*Stout v. Calvert*, 6 Mo. 254 ; *Steigers v. Darby*, 8 Mo. 679 ; *Jacob v. McLean*, 24 Mo. 40. If courts should permit such a cause to be set up, there would be no certainty in trials and no end to litigation. It is the duty of the party to see that he is properly represented in court ; and if his attorney is disabled, to bring that fact to the attention of the court, and either apply for a continuance, or employ other counsel:

It cannot be said here that Mills was misled by any understanding or arrangement entered into with Mr. Sharp. He only asked indulgence for filing his reply ; that was granted, and he filed it at his own convenience, long after the time had lapsed when it should have been filed by law. He was in court when he filed it, just previous to the time the cause was set for trial, and it is not shown that he notified either the court or the defendant's attorneys that he would be pre-

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vented from attending to the trial at the regular time on account of indisposition. The failure of Dodge to find the case on the docket cannot be invoked to aid him. The motion for a new trial was not filed till more than four days after the rendition of the judgment, and as to all matters of mere exception, that will be fatal to plaintiff's obtaining any relief here. But the law imposes on us the duty of examining the record; and if error appears thereon, we must correct it.

When the cause was called for trial the plaintiff did not answer or appear, and the court proceeded to hear evidence at the instance of the defendant and in his behalf, and then gave judgment for him for the full amount of the offset and counter-claim set up by him in his answer. Was this proper? The counsel on both sides have passed over the matter in silence and seem to have treated it as admittedly regular. But we are not satisfied with this course of procedure. Although when the defendant files a counter-claim, and the plaintiff replies thereto, the parties are to a certain extent both plaintiff and both defendant, as each claims affirmative relief; yet by the very provisions of the statute the counter-claim is set forth in the answer and forms a part of it. The plaintiff is always at liberty to dismiss his action, or suffer a non-suit, before his cause is submitted; and if he fails to appear when it is called, it may be dismissed for want of prosecution. This works no injury to the defendant; for if he has merits in his counter-claim, he can institute proceedings against the plaintiff at any time. This precise case does not seem to have been within the contemplation of the Code, and no similar case has arisen that we are aware of calling for a judicial construction. As the Practice Act is a radical innovation on the whole system of pleading, it will only be followed as far as its provisions are plain; and where doubt occurs, we must look to the law as it existed before the change was made.

Mr. Stephens says: "Again judgment of non-suit may pass against the plaintiff, which happens when, on trial by

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jury, the plaintiff, on being called or demanded, at the instance of the defendant, to be present in court while the jury give their verdict, fails to make his appearance. In this case no verdict is given, but judgment of non-suit passes against the plaintiff. So if, after issue is joined, the plaintiff neglect to bring such issue on to be tried in due time, as limited by the course and practice of the court in the particular case, judgment will also be given against him for the default, and it is called judgment as in case of non-suit"—Steph. on Pl. 609. In equity when a cross-bill is often resorted to, to furnish relief to the defendant, and determine the whole controversy between the parties, the bill is treated as a mere auxiliary suit, or as a dependency upon the original suit—Story Eq. Pl. § 399.

The answer under the Practice Act must contain, first, a denial of the allegations in the petition controverted by the defendant, and secondly, a statement of any new matter constituting a defence or counter-claim. The counter-claim then, although a separate cross-demand on which the defendant may be entitled to judgment, is nevertheless a part of the answer and an auxiliary suit—a dependency on the original suit or petition.

If the plaintiff does not come into court and prosecute his suit, no judgment can be taken against him, and his action should be dismissed, or judgment of non-suit rendered. The rights of the defendant are not prejudiced, and he can pursue his remedy on the matter set up in his counter-claim as an original action.\*

The judgment must be reversed and the case remanded; appellant to pay the costs in this court. The other judges concur.

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\* See R. C. 1855, p. 262, § 16. Trial by Proviso; 2 Tidd's Prac. 699; 21 Vin. Ab. A. 1, 192, R. 82; Regina v. Banks, 2 Salk. 652; Rex v. McLeod, 2 East, 202, n. a.; Humphreys v. Rowley, 4 T. R. 767; King v. Pippett, 1 T. R. 492; S. C., 1 T. R. 695.

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STATE OF MISSOURI TO THE USE OF FRANCIS HAFKEMEYER,  
Appellant, v. JOHN MCKELLOP, JOSHUA CHEEVER, WIL-  
LIAM GRAMM, EDWARD SCHLICHTING, AND EDWARD R.  
BATES, Respondents.

*Practice—Party—Execution—St. Louis County.*—Under the provisions of the statute "concerning the duties of sheriff in St. Louis county," of March 3, 1855, and March 14, 1859, the beneficiary in a deed of trust of personal property may file his claim with the sheriff, and sue upon the bond taken. He is a party in interest under the statute. See R. C. 1865, ch. 160, secs. 28 & 29.

*Appeal from St. Louis Court of Common Pleas.*

*E. C. Kehr, and Cline & Jamison, for appellant.*

I. Hafkemeyer had the right to claim the property, and the sheriff was authorized to demand the bond in question. The only person excluded from making claim to the property levied on is the defendant in the writ. Every other person having an interest in the property may claim the same.

The statute does not require the legal owner to claim the property levied on, but any person having "any interest therein" may claim the same. The term "any interest therein" is certainly sufficiently comprehensive to embrace any right, whether legal or equitable, which may be acquired to personal property. Sec. 3 says that the claimant shall describe the property and "state his interest therein"; also sec. 2 of amendatory act. Can it be said that the cestui que trust in a deed of trust to personal property has "no interest in such property?"—Act concerning duties of sheriff, &c., in the county of St. Louis, and approved March 3, 1855, and amendatory act approved March 14, 1859; also section 4 of same act.

*Knox & Smith, for respondents.*

WAGNER, Judge, delivered the opinion of the court.

This was an action on a bond given under the law specially applicable to St. Louis county, entitled "An act con-



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cerning the duties of sheriff and marshal in the county of St. Louis, in relation to the levy and sale of such property under execution or attachment as may be claimed by third persons."

The petition alleged that on the 23d day of February, 1861, one Lohman was indebted to Hafkemeyer, the appellant, in the sum of three certain promissory notes, and that, for the purpose of securing the payment of the said notes, Lohman made, executed and delivered to Theodore Kroschel, as trustee, his certain deed of trust conveying personal property therein described, for the use and benefit of Hafkemeyer; that on the ninth day of October, 1861, William Gramm and Edward Schlichting instituted suit by attachment in the St. Louis Court of Common Pleas against said Lohman, and that under color of the writ issued therein to John H. Andrews, sheriff of St. Louis county, the property in the said deed of trust was levied upon to satisfy the same; that Kroschel, the trustee, refused to claim the same, although often requested so to do by Hafkemeyer, the beneficiary in the deed, and that thereupon the cestui que trust (Hafkemeyer) claimed, and notified the sheriff in writing, according to the statute, that he held the deed of trust on said property; whereupon the sheriff required a bond of the plaintiffs in the attachment suit, which bond was given in due form, with McKellop as principal and his co-respondents as securities, which is set forth in the petition; a breach is then assigned, and a prayer for judgment.

Respondents filed an answer charging fraud in the transaction, putting in issue the good faith of the deed of trust under which Hafkemeyer claimed the goods, and also denied the identity of the goods seized with those conveyed.

The cause was tried and a judgment rendered for the appellant. Respondents then filed their motion in arrest of judgment, alleging that the claim was not made in compliance with law; that it should have been made by the trustee and not the cestui que trust. This motion the court sustained on the ground that appellant had nothing but an



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equitable interest in the goods seized, and dismissed the suit.

The case is here on appeal. The court assumed that the legal title was in the trustee, and no one but him could maintain the action. In a deed of trust conveying personal property, the whole beneficial interest is in the *cestui que trust*, and he is substantially the owner, though the naked legal title is for convenience vested in the trustee.

The local act under which the claim was made provides that any person who has any interest in the property may claim the same. If the deed was valid, the appellant had an equitable interest, and he was the only person who really did have an interest, as no other person was named in the deed as a beneficiary—*Winkelmeier v. Weaver*, 28 Mo. 359. He was the real party in interest and if he is precluded from bringing his suit, and through the obstinacy, refusal to act, or connivance with the adverse party, the trustee will not permit his name to be used, he will then stand in the attitude of a party having an undeniable right, but no remedy, a thing which the law will not endure.

The case should have stood on its merits; it was of no consequence to the respondents whether the action was prosecuted in the name of the trustee or *cestui que trust*; the making the former a party, at best, would be purely formal. The motion in arrest should have been overruled.

Reversed and remanded. The other judges concur.

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STATE OF MISSOURI, Respondent, v. ALBERT EBERT, Appellant.

1. *Constitution—Crimes—Court of Criminal Correction.*—The provisions of Gen. Stat. 1865, p. 835, § 15, providing that in the county of St. Louis all misdemeanors shall be proceeded with by information in the Court of Criminal Correction, are not in conflict with the provisions of sec. 24, art. 1, of the Constitution; neither does the law organizing the court violate that provision of the Constitution forbidding the General Assembly from passing special laws.

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2. *Crimes — Gaming — Criminal Practice.* — In a prosecution under the act, Gen. Stat. ch. 206, § 18, it is a sufficient defence that the premises occupied by the gambling device, and in which gambling was carried on, were not in the actual possession or control of the defendant, but were occupied by another person under a lease from defendant.

*Appeal from St. Louis Court of Criminal Correction.*

*Holliday and Sanders*, for appellant.

I. The provision is a violation of § 24, art. 1, of the Constitution of the State of Missouri, which provides that "no person can, for an indictable offence, be proceeded against criminally by information," &c. The question as to what is meant by an "indictable offence," in this section of the Constitution, has been fully established in this State by the decisions of this court in the three following cases: *State v. Stein*, 2 Mo. 67; *State v. Ledford*, 3 Mo. 101; and *State v. Cowan*, 29 Mo. 330.

II. The appellant insists that the provision quoted from the 15th section of the act establishing the St. Louis Court of Criminal Correction is in direct violation of § 27, art. 4, of the Constitution, which provides that "the General Assembly shall pass no special law for any case for which provision can be made by a general law," &c.

*Colcord*, for respondent.

I. The offence charged was a misdemeanor—R. C. 1865, p. 818, ch. 206, § 18.

II. The St. Louis Court of Criminal Correction has exclusive jurisdiction of all misdemeanors committed in St. Louis county—§ 10 of "An act to establish a Court of Criminal Correction in St. Louis county," R. C. 1865, p. 897.

III. No indictment can be found for any misdemeanor, under the laws of this State, committed in the county of St. Louis, but the same must be presented by information to the St. Louis Court of Criminal Correction—R. C. 1865, p. 897, § 15.

IV. The offence was proceeded against not at common law,

but under that statutory provision which creates the offence and prescribes the penalty—R. C. 1865, p. 818, ch. 206, § 18.

V. The Legislature has full power to establish tribunals inferior to the Supreme, District and Circuit Courts, for the trial of civil and criminal cases, and to direct their mode of proceeding—§ 1, art. 6, Constitution, R. C. 1865, p. 35.

VI. The Legislature had full power to provide, by special law, that misdemeanors should be proceeded against by information in the *county of St. Louis*; for by reason of existing differences the necessity of such provision extended *only* to St. Louis county, and not to any considerable portion of the State; wherefore a general law could not be made applicable—§ 27, art. 4, Const., R. C. 1865, p. 32.

VII. The fact that one David Foster held the premises, where the prohibited gaming table was alleged to have been set up, under and by virtue of a written lease, furnishes no excuse to the defendant Ebert; for such lease was wholly void as against defendant, by reason of David Foster, the lessee of Ebert, having set up and kept a prohibited gaming table or device upon and in the leased premises, and such lease could not therefore in any manner affect the right or power of defendant to fully control the premises, or afford any excuse for a want of proper control and care of the premises upon his part—R. C. 1865, p. 818, ch. 206, § 22.

WAGNER, Judge, delivered the opinion of the court.

Ebert, the appellant, was proceeded against by information, in the St. Louis Court of Criminal Correction, under the 18th section of chapter 206 of the General Statutes of this State, for permitting gaming tables to be set up and used for the purpose of gaming in a house to him belonging, or by him occupied, or of which he had at the time the possession or control. The jury found him guilty and assessed a fine of fifty dollars against him. A motion was made for a new trial, and also in arrest of judgment, which motions being overruled by the court, an appeal was taken and prosecuted. The grounds relied upon in this court for a reversal

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of the judgment are that the fifteenth section of the act establishing the St. Louis Court of Criminal Correction, providing that offences of this nature shall be proceeded with by information instead of indictment in St. Louis county, is antagonistic to the twenty-fourth section of the first article of the State Constitution; and also that the court erred in giving and refusing instructions.

In the declaration of rights as contained in the Constitution, it is asserted that no person can, for an indictable offence, be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia when in actual service, in the time of public danger, or, by leave of court, for oppression or misdemeanor in office. Section 15, Gen. Stat., p. 897, declares that after the Court of Criminal Correction shall have been organized and opened for the transaction of business, "no indictment shall be found for any misdemeanor under the laws of this State, committed in the county of St. Louis, the punishment whereof is by fine, or imprisonment in the county jail, or both, and the same shall be presented to the St. Louis Court of Criminal Correction by information." The permitting a gaming table to be set up or used, for the purpose of gaming, by any person on premises belonging to him, or by him occupied, or of which he hath at the time possession or control, is by the general statutes a misdemeanor, punishable by fine, and an indictable offence.

It is now argued that the appellant was charged with an indictable offence, and that therefore he could not be prosecuted by information, and that it was incompetent for the Legislature to enact a law authorizing such a proceeding in St. Louis county.

In article 5 of the Amendments to the Constitution of the United States, it is said that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, &c. The same or a similar provision is to be found in most of the State Constitu-

tions ; but this relates only to felonies and the higher grade of crimes, and has no application to misdemeanors. In an early case in this court, the question was discussed, and some doubt existed in the minds of the judges, as to what was the correct meaning of the words "indictable offence," as used in the clause of the Constitution ; but it has long since become the settled doctrine that as to misdemeanors the Legislature may make them punishable either by indictment or information—*State v. Ledford*, 3 Mo. 73 ; *State v. Cowan*, 29 Mo. 330. There are some grades of offences which were indictable at common law, which are not so by statute. It having been found by experience more expedient and wise to proceed with those of a lesser character, usually coming within the denomination of misdemeanors, in a more summary and expeditious manner than by the cumbersome process of indictment.

The Legislature has always assumed thus to act, and we are unable to perceive any valid or plausible reason for disputing its authority. The bill of rights, in its inhibition against proceedings by information in indictable offences, does not undertake to define what constitutes an offence that is indictable. It was most assuredly not contemplated or intended to draw within the scope of its provisions all offences which were indictable at common law. The punishing of assaults and batteries and other misdemeanors, by information, was practised in England after the enactment of Magna Charta, which guarded the rights of Englishmen, and precluded their being prosecuted for certain high crimes and felonies otherwise than by presentment and indictment of a grand jury. The same course has been pursued in the American States since the adoption of their constitutions. There is another point which arises on the record which presents more difficulty, and that is, whether the act does not violate that clause in our Constitution which says "the General Assembly shall pass no special law for any case for which provision can be made by a general law ; but shall pass general laws providing, so far as it may deem necessary, for the cases

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enumerated in this section, and for all other cases where a general law can be made applicable." The section in which this provision is found enumerates and places a prohibition on many acts which were theretofore subjects of special legislation. The law in question does not fall within the specific acts prohibited in the enumeration; but if obnoxious to objection, it must be on account of the words "all other cases where a general law can be made applicable."

The law establishes and organizes a new court, and confers special jurisdiction; this is within the undoubted province of legislative power.

To promote the ends which led to the creation of the new court, it was necessary to change and modify the remedy and forms of procedure in that class of cases coming within its jurisdiction. The court itself would not be necessary throughout the State, nor would a general law with like or similar provisions be applicable to the whole State. In a large city like St. Louis, where vice and crime spring up and multiply, it may be not only necessary, but even indispensable, for the public good, and to protect the public morals, to institute in case of misdemeanors a more summary mode and manner of proceeding than by the slow, expensive and cumbersome process of indictment. It is in the nature of a police or municipal regulation, and although highly necessary in one community, it may be wholly inapplicable to another.

The evidence on the trial, as preserved in the bill of exceptions, showed that the appellant was the lessee of the premises where the gaming was carried on, and that he had sub-let the same to one Foster, who had the exclusive possession and control of the rooms in which the gambling took place. The appellant asked the court to instruct the jury, that if they believed from the evidence that the premises described in the information in which the gambling was shown to have been done, or the gambling device was set up, was in the actual possession of Foster, and was occupied by Foster exclusively, and that appellant did not have the



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actual possession thereof, he having leased or rented the same to Foster, then they should find for appellant. The court refused the instruction. The evidence did not show that the appellant had *any* direct knowledge that gaming was carried on at the premises, but it did show most conclusively that he had parted with the actual possession and all control over the same to Foster, who held by a good and subsisting lease. The instruction should have been given. We will say further that the evidence was not sufficient to justify the giving of the first instruction on the part of the State.

The judgment will be reversed and the cause remanded. The other judges concur.

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THE STATE OF MISSOURI ON THE RELATION OF JULIUS CONRAD,  
Appellant, v. ALFRED C. BERNOUDY, Respondent.

*Constitution—Quo Warranto—Ousting Ordinance.*—The provisions of the ordinance of the Convention adopted March 16, 1865, G. S. 1865, p. 47, commonly called the Ousting Ordinance, were within the powers of the Convention, and were constitutional.—See *Thomas v. Mead*, 36 Mo. 242; *State v. Bernoudy*, 36 Mo. 279.

*Appeal from St. Louis Circuit Court.*

*James Taussig*, for appellant.

*Broadhead and Garesché*, for respondent.

HOLMES, Judge, delivered the opinion of the court.

The case presents the single question of the validity of the "Ordinance providing for the vacating of certain civil offices in the State," passed in Convention on the 17th of March, 1865—Gen. Stat. of 1865, p. 47. It arises upon demurrer to the information. The court below sustained the demurrer for the reason "that it appeared from the information that the defendant's term of office had not yet expired, and that the ordinance vacating the office was illegal, inoperative and void."



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The court appears to have taken judicial notice of the Constitution and Laws of the State but for the purpose of declaring this ordinance to be null and void, and no part of the Constitution. The former Constitution of the State contained this declaration :

"That the general, great, and essential principles of liberty and free government may be recognized and established, WE DECLARE,

"1. That all political power is vested in and derived from the people.

"2. That the people of this State have the inherent, sole and exclusive right of regulating the internal government, and police thereof, and of altering and abolishing their Constitution and form of government, whenever it may be necessary to their safety and happiness"—Rev. Stat. of 1855, p. 82.

The Legislature under this Constitution, on the 13th of February, 1864 (Laws of 1863-4, p. 24), passed "An act to provide for the calling a State Convention," which, by the fifth section of the act, should "proceed to consider, 1st, such amendments to the Constitution of the State as may be by them deemed necessary for the emancipation of slaves; 2d, such amendments to the Constitution of the State as may be by them deemed necessary to preserve in purity the elective franchise to loyal citizens, and such other amendments as may be by them essential to the promotion of the public good." Under the provisions of this law, the Convention was elected and organized, and proceeded to amend the Constitution in such a manner as they deemed essential for the promotion of the public good, and adopted this ordinance among others, and framed and adopted a new Constitution, which was submitted to a vote of the people for ratification, and was finally adopted by them. This body represented the people of the State in their sovereign capacity. The act contained no limitation on the powers of the Convention, when it should be lawfully assembled, even if it were admitted that the General Assembly had the power (which we

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think they had not) to place any limit upon the action of a body so called and constituted, whenever it should be thus legally organized as a body, representing the whole people in Convention assembled, for all purposes relating to the public good; though a Convention might be called and elected for one or more specific objects and none other. A power to amend the Constitution in all respects deemed essential for the public good, or to alter or abolish it, if it were deemed necessary for their safety and happiness, necessarily includes the power to amend it in any particular as well as in its total scope.

As to the particular amendment which consisted in this ordinance, it is not without frequent example in the Constitutional History of the State. Similar vacating ordinances or amendments were adopted in 1822 (Rev. Stat. 1855, p. 90), in 1834-5 (ibid. p. 91), in 1848-9 (ibid. p. 93), in 1850-1 (ibid. p. 94), and in 1861 (Ord. of Oct. 16, 1861). The courts have always recognized the validity of these ordinances. In the case of the State v. McBride, 4 Mo. 303, the amendment of 1834-5, which vacated the offices of the judges of the Circuit Courts on the first day of January, 1836, was held to be valid, and the defendant, who had held over after that day, relying upon some irregularity in the legislative proceedings, but not questioning the validity of the amendment, if duly enacted, was adjudged guilty of usurpation and ousted. This concurrent action of all branches of the State government for so long a period, may well be deemed sufficient to settle all questions as to the validity of constitutional ordinances of this nature.

This ordinance was recognized by the executive department; and it was held in *Thomas v. Mead*, 36 Mo. 242, that all courts sitting under the State government were bound to take judicial notice of the political action of the State Convention, and of the action of the Governor in recognizing the ordinance and putting it into operation as a part of the Constitution of the State. It was so held in effect in *Luther v. Borden*, 7 How. U. S. 1. In the case of the State v. Ber-

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noudy, 36 Mo. 279, which was an *ex officio* information in the nature of *quo warranto*, filed by the Circuit Attorney (in place of the Attorney General) on behalf of the State, against this same defendant, in respect of this same matter, the validity of this ordinance was fully recognized, and, it appearing that the defendant was holding over, by sheer intrusion and usurpation, without a shadow of right, judgment of ouster went against him. No authority has been produced to shake the legal foundations of these decisions, and nothing more remains but to reverse the judgment of the Circuit Court, at the costs of the defendant.

Judgment reversed, and judgment will be entered in this court against the defendant for the costs of suit. The other judges concur.



JOHN W. BIGELOW *et als.*, Respondents, v. THOMAS STRINGER  
*et als.*, Appellants.

*Fraudulent Conveyances—Use of Grantors—Creditors—Practtce.*—Where it is apparent upon the face of the deed of assignment or mortgage made by insolvent debtors that the deed was made for the purpose of hindering, delaying or defrauding creditors, it is the duty of the court to instruct the jury that the deed is void, and the question of the intent of the grantors should not in such case be left to the determination of the jury. And when upon the face of the deed of assignment it appeared that the parties supposed that there would be a large surplus after paying the debts described, and the whole property was protected from all forced sales or attachments and levies for the period of two years, during which period the management of the business was to be under the supervision of the grantors—*held*, that upon its face the deed appeared to be made for the purpose of hindering, delaying and defrauding creditors, and was void.

*Appeal from St. Louis Court of Common Pleas.*

This was an action of trespass *de bonis asportatis* brought by the plaintiffs, consisting of several mercantile firms of the city of St. Louis, against the defendants, also consisting of a number of firms in the same city. The plaintiffs alleged that on or before April 2, 1861, they were the owners of a cer-

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tain lot of goods in a certain store in the town of Tipton, Moniteau county, State of Missouri, and that the defendants on the said 2d of April took them from the possession of the plaintiffs; that on or before the 10th of April, 1861, they were the owners and possessors of a certain lot of goods in the town of Sedalia, county of Pettis and State of Missouri, and that the defendants on the said 10th of April took them from the plaintiffs.

The defendants traversed the allegation of the plaintiffs as to the ownership and possession of the property, and justified the taking of the property in question by virtue of executions obtained against the firm of Williams & Crooks, and the sheriff's levy by virtue thereof.

The plaintiffs then read in evidence the assignment of the goods in question from Williams & Crooks to plaintiffs; this assignment was dated March 20, 1861, and the said Williams & Crooks after reciting that they are indebted to the plaintiffs in various sums, therein enumerated, and that they are desirous of securing to the plaintiffs the debts due them, proceed to declare that

"The parties of the first part do by these presents bargain, sell, convey, deliver and set over unto the parties of the second part their entire stock of goods, wares and merchandise now owned and possessed by them in the towns of Tipton and Sedalia aforesaid, a schedule whereof is hereto annexed, marked 'A.,' " &c. [The rest is given in the opinion.]

The following instructions were given for the plaintiffs :

1. It is lawful for a debtor in failing circumstances to pay one debt, or secure the same, and leave other debts unpaid and unsecured, notwithstanding such payment or security may embrace the whole of the property owned by the debtor.

2. If the jury find from the evidence that the writing read in evidence, purporting to be an assignment to the plaintiffs by Williams & Crooks, was executed by one of the parties composing said firm, and that after the execution of said assignment and before the executions read in evidence were

placed in the hands of the sheriffs respectively of Pettis and Moniteau counties, the other partner of said firm of Williams & Crooks ratified or approved the act of his copartner in executing said assignment; and if the jury also believe from the evidence that the plaintiffs at the time said assignment was made were creditors of the firm of Williams & Crooks, and that said assignment was made in good faith to secure such indebtedness, and that the plaintiffs took possession of the goods, wares and merchandise conveyed to them by said assignment, and continued in possession and control thereof up to the time said goods were seized under the executions read in evidence, then the jury should find for the plaintiffs.

3. The burden of proving that the assignment read in evidence by the plaintiffs was made with a fraudulent intent on the part of Williams & Crooks, or either of them, to hinder, delay or defraud their creditors, rests on the defendants; and unless such fraudulent intent has been made to appear from the evidence to the satisfaction of the jury, the jury will presume that it was made with an honest intent.

4. Before the jury can find the conveyance read in evidence void on the ground of fraud, they must not only find that the same was made with a fraudulent design on the part of Williams & Crooks, or either of them, but also that such fraudulent design was participated in by the persons to whom the goods were conveyed by said instrument or their agents, and unless the same has been established to their satisfaction by the evidence in the cause, they cannot find against the plaintiffs on the issue of fraud.

5. Although the jury may find from the evidence that subsequent to the making of the assignment read in evidence both W. W. Williams and W. P. Tooley made entries of transactions in the books of Williams & Crooks produced in evidence, yet the plaintiffs cannot be affected or prejudiced by said entries in said books, unless the jury find from the evidence that said entries have reference to the sale or disposal of the goods assigned by Williams & Crooks to the

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plaintiffs, or that the plaintiffs authorized the transactions to which said entries relate.

6. The jury are instructed to disregard that part of the deposition read in evidence of H. Clay Ewing that refers to a conversation in the railroad cars between him and Berry, or Lonergan, about the assignees supplying new goods.

7. If the jury find for the plaintiffs, they should assess the damages at the amount now due on the notes described in the assignment and read in evidence by the plaintiffs, less the amount paid on said notes by W. P. Tooley after said assignment, if the amount due on said notes does not exceed the amount of the value of the property taken by the defendants and interest to the present time; but if the amount now due on said notes does not exceed the value of the property in dispute, then the jury should only assess the plaintiffs' damages at the value of the said property taken less the amount of said payment, with interest thereon at six per cent. per annum from the time of the institution of this suit until the present time.

The following instructions were given at the instance of the defendants:

1. The fact that there was a trial of the right of property before the sheriff's jury should not be considered by the jury in this case. The jury should wholly reject this fact from their consideration.

2. Executions are a lien upon the personal property of the debtor from the time they come into the hands of the sheriff of the county where the property is situated.

3. Unless the jury are satisfied by the evidence that Crooks assented to or ratified the execution of the instrument of writing read in evidence by the plaintiffs before the executions of defendants were delivered to the sheriff, the plaintiffs cannot recover in this case.

4. If the jury believe from the evidence that any witness in this case has knowingly sworn falsely to any material fact



in this case, they may discredit and reject the whole testimony of such witness.

5. To make the instrument purporting to be signed by Williams & Crooks, and read in evidence by the plaintiffs, valid as against the creditors of Williams & Crooks, there must have been an actual delivery of the property, and an actual and continued change of the possession of it; that is, Williams & Crooks must have delivered the property to the grantees in said instrument with the intention of giving them the right to the possession of it, and said grantees must have accepted the property with the intention of holding it under said instrument, and must have continued so to hold possession of it, by themselves or their agents, up to the time it was levied on by the sheriff.

The defendants also asked the following instructions, which were refused:

1. [This instruction is substantially the same as the third given for the defendants.]

2. Although the jury may believe that Williams & Crooks were indebted to the plaintiffs for the debts mentioned in the conveyance read in evidence, yet if they further believe from the evidence that at the time said conveyance was made Williams & Crooks were largely indebted to defendants and others, and that the purpose and intention of Williams & Crooks in making said conveyance was to hinder and delay their creditors, or any of them, for two years, from selling said goods for the payment of their debts, and that plaintiffs or their agents knew of such purpose and intention and assented thereto, and accepted such conveyance for such purpose, then said conveyance was fraudulent and void as against the creditors of Williams & Crooks existing at that time.

3. The court instructs the jury, that if they find from the evidence that at and before the execution of the instrument executed by Williams, read in evidence by plaintiffs, Williams & Crooks were in possession of the goods in con-



troversy, and had John P. Tooley and others in possession and charge thereof for them, and said Tooley and others who had so had charge and possession for Williams & Crooks afterwards remained and continued in such possession of the goods, and continued so to do until the execution in favor of defendants read in evidence were levied thereon, there was not a delivery of said property and an actual continued change of the possession thereof.

4. The court declares the law to be that the instrument in writing dated March 20, 1861, read in evidence by plaintiffs, was and is void as against the creditors of Williams & Crooks then existing.

5. The court declares that upon the evidence in the cause plaintiffs cannot recover.

6. By the instrument in writing purporting to be signed by Williams & Crooks the property therein described was conveyed to the plaintiffs to secure them the debts due them, said property was placed absolutely beyond the control of the other creditors of said Williams & Crooks, not named in said instrument, for two years at least; and the business of selling said property was to be carried on by said plaintiffs, the profits and losses of said business were to be on account of said Williams & Crooks, and the expenses of carrying on the said business were to be borne by said Williams & Crooks.

7. To constitute a valid delivery and change of the possession of property that shall be good against creditors, it is necessary that there should be such an open, apparent and visible change of possession as would be sufficient to show persons who had previous business transactions with the firm, that the firm had parted with their interest in the business. Unless there was such a delivery and change of possession in this case, the law presumes the sale to be fraudulent and void as to the creditors of Williams & Crooks.

8. The instrument in writing under which plaintiffs claim the property in question is a mortgage. No mortgage of personal property is valid against any other person than the par-

ties thereto, unless the mortgaged property be delivered to, and the possession thereof be retained by, the mortgagees, or unless the mortgage be recorded.

9. The instrument of writing signed, or purporting to be signed, by Williams & Crooks, and read in evidence by the plaintiffs, purports to convey to plaintiffs the entire stock of goods, wares and merchandise owned by Williams & Crooks at Tipton and Sedalia. By said instrument the plaintiffs were authorized to take immediate possession of said property, and to sell the same, as a prudent merchant would dispose of his own merchandise, at wholesale or retail; the instrument further authorized the plaintiffs to employ agents, or to rent stores, and to pay for both agents and rents out of the proceeds of the sales of the goods so conveyed; it required plaintiffs to keep accurate and just accounts of all sales and of all expenses, which accounts were at all times to be open to the inspection of Williams & Crooks. The said plaintiffs were not authorized until the lapse of two years to sell said property, or any portion thereof, at public sale.

10. To make the instrument purporting to be signed by Williams & Crooks, and read in evidence by the plaintiffs, valid as against the creditors of Williams & Crooks, there must have been an actual delivery of the property, and an actual and continued change of the property mentioned in the instrument. There is no evidence in the case of a valid delivery and continued change of the property in dispute.

11. The law presumes the sale of personal property unaccompanied by a delivery and continued change of possession of the property sold, to be fraudulent as to creditors.

12. The delivery and change of possession to be valid as against creditors must be so open and apparent that persons who have had previous dealings with the party selling may see, from the manner in which the business was transacted, that there has been a change of ownership. A mere formal delivery, such as going to a store where the property sold is situated, and there telling the purchaser that the goods in

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the store are hereby delivered, and delivering the key of the store, is not a good and sufficient delivery.

*Sharp & Broadhead, and Knox & Smith, for appellants.*

The deed of assignment is void upon its face. The schedule attached to the deed shows that \$14,499.98 worth of goods were conveyed to the grantees for the ostensible purpose of paying off \$7,651.33 of indebtedness to them; the petition in this case shows that the goods were worth \$14,499.98.

The instrument is not a mortgage or a deed of trust, but an assignment—an absolute transfer of property for the payment of specified debts. The assignees are allowed two years to sell the property, which at the time of the assignment is worth nearly double the amount of the debts to be paid out of it; and even then it is discretionary with them whether they will sell the remainder of the goods or not. If the intention of such a conveyance was to put the property beyond the reach of creditors—to lock it up in the hands of trustees in order that it might be kept out of market until there should be a rise in prices or a better demand, and to prevent its being subjected to forced sale and sacrifice under execution—or to gain time to enable the parties to make other arrangements for the satisfaction of creditors—or of putting it beyond the reach of legal process at the suit of creditors—if any of these objects appear from the face of this instrument itself, or is the necessary effect of its operation, although it be coupled with a promise to pay an honest debt, it is nevertheless fraudulent and void under our statute—State to use, &c. v. Benoist, 37 Mo. 500, 514-17.

If the only purpose was to secure the genuine debts mentioned in the assignment, why convey property double in value to the amount of those debts? or why postpone indefinitely the time when the grantees should be compelled to sell? Postponing to an unreasonable time the period of sale and payment will avoid the assignment—11 Wend. 187; 9

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Sm. & M. 396; 24 Miss. 106; 8 Yerg. 134; Potter v. McDowell, 31 Mo. 62. So conveying property largely exceeding in value the amount of the debt is evidence of fraud—8 Barb. 124; 3 Sanf. 311; 31 Mo. 62.

The intent to hinder and delay may be inferred from the necessary operation of the instrument. Whilst the debtor has a right to prefer one creditor to another, every other creditor has a right to demand that he shall not by such preference be immeasurably delayed or hindered from subjecting all the debtor's property not necessary to meet that preference to the payment of his debts by due process of law; he has a right to the surplus, and to have that surplus made available—Reed v. Pelletier, 28 Mo. 177.

A deed which operates to hinder and delay creditors is fraudulent in law, independent of the motives of the grantor—44 Barb. 192; Potter v. McDowell, 31 Mo. 62.

It may be laid down as a rule under the statute of frauds, that every conveyance which by its terms is not reasonably necessary to secure the debt preferred, and which by such terms necessarily hinders, prevents or delays the lawful actions of other creditors, is a fraud upon the rights of such creditors; such is the doctrine held by this court in the case of State to use, &c. v. Benoist et al., 37 Mo. 500.—24 Miss. (2 Cush.) 106.

Williams was an incompetent witness to establish the validity of the instrument, or to give to it by his verbal statements an effect which it would not otherwise have—R. C. 1855, p. 1578.

*Krum, Decker & Krum, and Cline & Jamison*, for respondents.

The appellants claim that the court below erred in refusing to pronounce the deed made by Williams & Crooks to the plaintiffs, fraudulent and void on its face, as a matter of law, claiming that it appeared to have been made for the use of the grantors, within the meaning of the first section of

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our statute concerning fraudulent conveyances, R. C. 1855, p. 822, § 1, which is as follows: "Every deed of gift and conveyance of goods and chattels in trust to the use of the grantor so making such deed of gift or conveyance, is declared to be void as against creditors, existing and subsequent, and purchasers."

The second section has reference to the intention of the parties, and has been unanimously held by our courts to be a question of fact to be left to the jury, as will appear by reference to the following cases: *Shapleigh v. Baird*, 26 Mo. 362; *Johnson v. McAllister*, 30 Mo. 331; *Woods v. Zimmerman*, 27 Mo. 107; *Milburn v. Waugh*, 11 Mo. 369; *State to use, &c. v. Benoist*, 37 Mo. 500; *Gates v. Labeaume et al.*, 19 Mo. 17; *Kuykendall v. McDonald*, 29 Mo. 135.

The deed was not to the use of the grantor; it was a mortgage to creditors in good faith, to secure their debts or claims, and the thing pledged under it was delivered to the grantees (creditors), with power of sale to realize money to satisfy their claims; and if anything remained after this was done, it was to be handed over (whether money or goods) to the grantor or debtor. This, we claim, constitutes a valid deed under our statute of Personal Trusts.—See *Whitingham v. Lafoy*, 7 Cow. 737; 5 Cow. 547; *Grover v. Wakeman*, 11 Wend. 189.

FAGG, Judge, delivered the opinion of the court.

In the argument of this case several points have been discovered which we do not deem necessary to consider in this opinion, as the matter of chief importance is the construction of the instrument under which the respondents claim to be entitled to the property, for the taking of which by the appellants they instituted their suit in the court below. The determination of the case must at last turn upon the question as to whether or not this instrument upon its face shows that it is within the statute of this State concerning fraudulent conveyances. If it can be shown to be so, then it was

the duty of the court in which the cause was tried, as a matter of law, to have declared it fraudulent and void by giving the instruction to that effect which was asked by the defendants.

There was evidence, it is true, tending to show that the purpose of the grantors in making the conveyance was to get time, and to prevent a forced sale of the goods by other creditors, thereby causing them to be sacrificed; and we think the court erred in refusing to give an instruction hypothecated upon the evidence of Williams, one of the grantors. It was shown that these grantors (Williams & Crooks) were largely indebted to other parties besides those provided for in the deed. These parties were obtaining judgments against them, and Williams, who testified in behalf of plaintiffs, says substantially that one of the chief inducements to the execution of the deed was to prevent these judgment creditors from forcing their property to sale, and that the persons representing the respondents told him that he could prevent the sacrifice of the goods in that way, and he therefore executed the conveyance in order to get time. But passing this by, as well as the other points in reference to the competency of Williams to testify—the delivery of the goods to respondents—the assent of Crooks to the conveyance, which was executed by Williams alone after a refusal upon the part of the former to sign it—as well as other questions discussed, we come directly to consider the main question. It will not be necessary to review the former decisions in this court in the various cases which have arisen under this statute. It is perhaps safe to say, that, in every case to be found in our own reports, it has been held, that where it is apparent from the face of the deed itself that it is a conveyance to the use of the grantor, it is the duty of the court trying the cause, as a matter of law, to tell the jury that such conveyance is absolutely fraudulent and void as against creditors.—*Robinson's exec'rs v. Robards*, 15 Mo. 459; *Gates v. Labeaume*, 19 Mo. 17; *Brooks v. Wimer*, 20 Mo. 503; *Wal-*



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ter v. Wimer, 24 Mo. 63; Stanley v. Bruce, 27 Mo. 269; Hall v. Webb, 28 Mo. 408; Johnson v. McAllister's assignees, 30 Mo. 327; Potter v. McDowell, 31 Mo. 62; and State to use, &c. v. Benoist et al., 37 Mo. 500.

In the case of Zeigler v. Maddox, 26 Mo. 575, Judge Scott, in delivering the opinion of the court, says: "When the deed is fair on its face, but is affected with a secret trust in favor of the grantor, as such secret trust can only be shown by extrinsic evidence, the existence of fraud is a matter of fact to be tried by a jury, who will determine whether a deed was made with an intent to hinder, delay or defraud creditors or purchasers, such case coming within the provisions of § 2 of the act concerning fraudulent conveyances. In a case arising under the first section of the act, it is not necessary that the deed in so many words should express that it was in trust to the use of the grantor; but if such is the legal effect of it, as gathered from its language, the court will, as a matter of law, declare that it is void." If it is meant by this decision that the court would only be authorized, as a matter of law, to declare deeds void which come within the first section, and that in every case arising under the second section the question as to hindering, delaying and defrauding creditors is one of fact necessarily to be submitted to a jury, it is difficult to perceive upon what ground such a distinction rests. Under the first section, the question is whether or not it is a conveyance to the use of the grantor; under the second, it is true the word "intent" is used, but it does not necessarily follow that this can only be ascertained by extrinsic evidence. It is as much the duty of the court to declare the legal force and effect of the deed in the one case as it is in the other; and although it may not be expressed in terms, yet if a fair construction of its provisions will justify the conclusion that it will operate so as to hinder, delay or defraud creditors of their lawful actions and demands, it should be declared fraudulent and void as to creditors—State to use, &c. v. Benoist et al., 37 Mo. 500. Every man must be presumed to intend the necessary consequences of his act.



It is insisted on the part of the respondents that this conveyance was intended simply as a mortgage or security, and is not to be regarded as an absolute conveyance and transfer of the goods to be applied to the payment of the debts recited in it.

It is true that the deed was not executed, and the assignees have not proceeded in accordance with the provisions of the act in relation to voluntary assignments; but we think that the theory upon which this suit was prosecuted in the lower court, as well as the intention of the parties to the deed, warrant us in treating it as an absolute conveyance and delivery of the property for the purposes indicated.

Here was a stock of goods, stated in the schedule attached to the deed to be worth over \$14,000, estimated at St. Louis wholesale prices, transferred for the payment of debts amounting in the aggregate to about \$7,650. The deed after enumerating the debts to be paid, and describing the property conveyed, proceeds as follows:

“And the parties of the second part are by these presents authorized to take immediate possession of the same, and shall proceed as rapidly as possible to sell said goods, wares and merchandise, at wholesale or retail, as a prudent merchant would dispose of his own merchandise, and apply the proceeds, after the payment of necessary expenses, to the liquidation of the debts and interests aforesaid, distributing the proceeds among said debts and interests according to amount so as to make the payment on each debt and interest equal; and if there should be a surplus of goods, wares and merchandise, or of the proceeds thereof, the parties of the second part shall deliver and pay over the same to the parties of the first part, their executors, administrators and assigns, and the parties of the second part covenant with the parties of the first part to keep accounts, and just accounts, of all sales of said goods, wares and merchandise, and of the necessary expenses, and at all times to allow the parties of the first part access to the accounts aforesaid, and to observe

in all things the provisions of this conveyance. If the proceeds of said goods, wares and merchandise should not amount to enough to liquidate said debts and interest, after the payment of necessary expenses, within two years from the date of these presents, the parties of the second part may proceed to sell the remnant of said goods, wares and merchandise at public auction to the highest bidder, for cash, upon thirty days' notice of the time and place, disposing of the proceeds as hereinbefore provided."

The parties to this deed at the time of its execution must have contemplated a large surplus in the hands of the assignees, if the business should be carried on honestly and diligently. It really seems to have been intended simply as a continuation of the business in the ordinary way for a period of two years. It was not to be conducted by the grantors, or in their name, but it was at all times to be open to their supervision and inspection.

The mere fact of a reservation of a surplus would not of itself make it a conveyance to the use of the grantor. Upon this point, the former decisions of this court have not followed the course of decisions of the New York courts—*Richards et al. v. Levin*, 16 Mo. 596; *Johnson v. McAllister's assignees*, 30 Mo. 327. It was held in these two cases that such a reservation was really nothing more than what the grantor would be entitled to by law. This would certainly be taken to be the true interpretation of a deed in a case where there was no doubt of the insufficiency of the property conveyed to pay the debts provided for, or that possibly there might be something more than the required amount. In either case, it could hardly be considered as good ground for attacking the *bona fides* of the transaction, because the surplus should be regarded as a mere contingency, and as something not certainly within the contemplation of the parties. Here the property was at least double in value the amount of the debts; it was protected from forced sales by other creditors for a period of two years; the business to be

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conducted in such a manner as to realize as much as possible for the goods, and, to a certain extent, under the supervision of the grantors.

These were manifest advantages enuring directly to the benefit of the grantors. The property was safe from sacrifice for that period of time, and the surplus over and above the payment of expenses and the debts preferred was to be made as large as the nature of the case would admit of. There was no legal process by which the remaining creditors could have reached this surplus and made it available for the payment of their debts within the two years. These considerations would lead us very far towards the conclusion that the deed was in point of fact within the provisions of the first section of the act; and if the court below had so declared upon the trial, we should have felt much hesitation in reversing its judgment on that account. We think, however, that it comes most clearly within the second section, and should be held to be utterly void. This ruling is not believed to be contrary to the letter or spirit of any former determination of this question by this court, and is in strict accordance with the principles settled by the case of *State to use, &c. v. Benoist et al.*, 37 Mo. 500.

The judgment of the court of Common Pleas must be reversed and the cause remanded. The other judges concur.

Motion for rehearing overruled.

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STATE OF MISSOURI TO THE USE OF THE SOUTHERN BANK OF  
ST. LOUIS, Respondent, v. GEORGE O. ATHERTON AND D.  
H. ARMSTRONG, Appellants.

1. *Principal and Surety—Corporations—By-laws.*—The negligence of the directors and cashier of a bank in failing to comply with the by-laws of the corporation in examining its affairs, counting its cash, &c., &c., will not discharge the sureties upon the bond of the teller, who has committed a breach of his obligations by applying the moneys of the bank to his own use.

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2. *Principal and Surety—Bonds—Damages.*—Where the principal in a bond, given to secure the faithful performance of his duties as a teller of a bank, had, previous to the execution of the bond, taken and appropriated to his own use moneys of the bank, and after the giving of the bond had applied moneys received to wrong accounts so as to cover up his defalcation—*held*, that the security was not liable for the defalcation committed before the execution of the bond; and that for the mere misapplication of the moneys subsequently received to wrong accounts, the damages could be only nominal.
3. *Principal and Surety—Witness—Party.*—The principal in a bond, defendant in a suit against whom a judgment by default has been rendered, is a competent witness for his co-defendant, the surety in the bond.
4. *Action—Release—Co-obligors—Bonds.*—The release of one of several obligors does not discharge the other parties to the contract.—R. C. 1855, p. 873, § 14.

*Appeal from St. Louis Court of Common Pleas.*

The court gave the instructions asked by each party, as follows :

Plaintiff's instructions.—1. If the jury believe that defendant Atherton, as teller of the Southern Bank, on the 25th of March, 1859, received as such teller from Archibald Gamble, on deposit in said bank, the sum of \$744, and then entered the same as a deposit in the pass-book of said Gamble; and afterwards, and at different days and times between that day and the 25th April, 1859, and while he was still teller, and as such teller, he received from other persons and parties mentioned in the petition, in like manner, on deposit, large sums of money, amounting in the aggregate to over \$40,000; and having as such teller so received all of said sums on deposit in said bank, he withheld and withdrew said sums from the bank, and applied the whole amount thereof to his own use, or to purposes not those of the bank,—in such case said Atherton and the securities on his bond became liable and bound in the penalty of the bond for the sums of money so deposited by said parties and withheld and withdrawn from the bank by said Atherton.

[For 2d, see opinion.]

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Defendant's instructions, given :

1. Under the issues made by the pleadings, the burden of proof rests on the plaintiff to prove that the money sued for was embezzled or appropriated by G. O. Atherton after the bond read in evidence was made, and unless the plaintiff has shown in evidence to the satisfaction of the jury that said Atherton did embezzle or appropriate to his own use the money in question after the bond sued on was made, the jury should find for defendant.

2. Although the jury may find from the evidence that Atherton, while acting as teller, embezzled or appropriated to his own use some of the money of said bank, yet if the jury find that he embezzled or appropriated said moneys before the bond sued on was made, then as to such moneys the defendant Armstrong is not liable, notwithstanding the jury may also find from the evidence that said Atherton continued in the manner mentioned by the witnesses to elude or delay the discovery of his embezzlement or appropriation of money until after the bond sued on was made.

3. The burden of proof is on the plaintiff. The defendant Armstrong is only responsible for the amount of bank deposits appropriated by Atherton to his own use after the date of the execution of the bond sued on—that is, 21st March, 1859, and before the 25th April, 1859—and it devolves on the plaintiff to establish this amount in evidence to the jury. If the jury are satisfied from the evidence that the entire sum of money, as claimed to have been abstracted from the bank by Atherton upon the final settlement of accounts between him and the bank, had been used by Atherton in his private speculations before the defendant Armstrong became his security, they will find for the defendant Armstrong.

[For No. 4, see opinion.]

To the giving of instructions asked by plaintiff exceptions were duly taken.

Atherton having conveyed property to the bank, by which a large proportion of the defalcation was restored ; and Carr

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and West, who were with Armstrong on the bond, and who had also been securities on the former bond, and were therefore, in any view of the facts, liable, having paid what the bank esteemed their proportion of the balance, and been released, a judgment was rendered against Armstrong for \$6,666.66.

*Napton*, and *Krum*, *Decker & Krum*, for appellants.

For the reversal of the judgment, reliance is altogether placed upon the two points raised by the instructions, and the exclusion of Atherton as a witness.

I. The instructions are conflicting and irreconcilable, and assume two opposite and contradictory theories of the law. This will be apparent upon a perusal of the 2d instruction given for the plaintiff and the last instruction given for the defendant, which are precisely the antipodes of each other. The only question which could admit of discussion in reference to the point, is, which of these conflicting theories of the law is the correct one? The position of the instruction for the plaintiff is, that if the public officer, during his second term, wrongfully and contrary to his duty withholds entries from the book for the purpose of concealing defalcations or embezzlements of money made during his first term, the securities on the second bond are responsible for the amount abstracted under the first. Our instructions assume the reverse of this to be the law, and assert that each set of securities are responsible for the actual losses or abstractions occurring during their respective periods of securityship; and, as we supposed, all the decisions of this court proceed on this latter hypothesis. The subject has been five times before this court, and in all the cases this is assumed to be the law where there are different sets of securities. Indeed, upon the theory which prevailed in the trial of this case, where defalcations have occurred, the last set of securities must always be responsible whether the money was abstracted during their securityship or that of their predecessors;—a doctrine that would render altogether superfluous and



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useless all the investigation made in the cases heretofore decided by the court in reference to the time when defalcations occurred, when each breach of trust occurred, and what amount of damages would be chargeable to each set of securities.—*Draffin v. City of Boonville*, 8 Mo. 395; *Todd v. Boone Co.*, 8 Mo. 431; *Nolte v. Callaway Co.*, 11 Mo. 447; *State v. Smith*, 26 Mo. 226; *City of St. Joseph v. Merlatt*, 26 Mo. 233; *State to use, &c. v. Paul's exec'rs*, 21 Mo. 51.

II. Atherton was a competent witness under the act of February 12, 1857—Sess. Acts, p. 181. This act provides that where one of several defendants has a defence peculiar to himself, and a separate judgment may be rendered, the co-defendants are competent witnesses for him in reference to such defence. This law has been before the court in five cases.—*Garnier v. Lebeau*, 30 Mo. 229; *Schoeffer v. Kilmans*, 30 Mo. 232; *Vaughn v. Scade*, 30 Mo. 205; *Kleinmann v. Boernstein*, 32 Mo. 314; *Alexander v. Shortridge*, 33 Mo. 349; *Finley v. Robertson*, 31 Mo. 384. The same law is copied from the New York Code, No. 397, and the case of *Finn v. Gaston*, 4 Smith, N. Y. 382, is a decision upon its construction.

III. Atherton was a competent witness after he was defaulted. See *Garrett v. Ferguson*, 9 Mo. 126; *Conn v. Green*, 9 Mo. 200; *Hawley v. Levy*, 8 Mo., and *Brown v. Burns*, 8 Mo., on this point of default.

WAGNER, Judge, delivered the opinion of the court.

This was an action on a bond in the penal sum of twenty thousand dollars, executed by the defendant Atherton as principal, and Armstrong, West and Carr as sureties to the plaintiff. The bond was dated and executed on the 21st day of March, 1859, and approved on the same day, and conditioned that Atherton should execute and discharge the duties of teller of the Southern Bank of St. Louis with integrity and fidelity, and well and faithfully perform and fulfil the trusts reposed in him, and well and truly, at all times, when thereunto required, account for and render over all



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moneys, goods and chattels that might come into his hands or possession, so that no default, fraud or failure should happen or be occasioned by neglect or failure on his part to perform his duties as said teller. Under the appointment for which this bond was given, Atherton entered on the discharge of his duties as such teller on the 21st day of March, 1859, and continued to act till the 25th day of April next succeeding. The petition alleges a breach of the conditions of the bond, and states that said Atherton, while acting as teller under the appointment, abstracted and appropriated to his own use large sums of money belonging to the bank, and was a defaulter in a sum in excess of the penalty of the bond.

Atherton entered his appearance, and judgment was taken against him by default. West and Carr exhibited a release from the bank showing that they had paid two-thirds of the amount of the bond, and the suit was dismissed as to them. Armstrong alone defended, and in his answer denied that the money was abstracted or the defalcation occurred whilst Atherton was acting as teller by virtue of the last appointment; that is, between the 21st of March and the 25th of April, and during the time that he was one of the sureties; and averred that the money was taken and the fraud committed by Atherton when he was acting under a prior appointment, previous to the 21st of March, 1859, and before defendant was security on his official bond. For further answer, he stated that before and at the time he signed the bond sued on, the bank had in force a rule or by-law, by which it was provided that the cashier of the bank should carefully observe the conduct of all officers or persons employed under him; that he should daily examine the settlements of the cash accounts of the bank and take charge of the same, and whenever the actual account should materially disagree with the balance of the cash account, he should report the same to the president and directors of said bank without delay; and that it was his duty to ascertain by personal examination how the account stood, and to exercise a general and superintending

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control over the individual accounts and the affairs of the bank. He also alleged that the bank had another rule or by-law in force at the time he signed the bond sued on, whereby it was provided that a committee of three directors of the bank should be appointed by the board of directors, whose duty, among other things, should be suddenly, and without previous notice, to count the teller's cash book at least once in each month and as much oftener as they might deem necessary, and to count in the same manner all the cash of said bank, at least twice in each year, without notice, and with as much variation in time of commencement as would be most likely to frustrate an attempt to conceal any abstraction of funds that might have been made; that he was induced to go security on the bond because he had knowledge of the existence of the said rules or by-laws, and with the confident expectation that they would be observed and enforced, but that the directors and officers of the bank, while Atherton acted as teller therein, wholly neglected and failed to carry the rules into effect, and failed, by committee or otherwise, to count the teller's cash book in each month, or at all, during the time that said Atherton acted as teller after the bond sued on was executed;—by which it is claimed that if any of the money or bank notes belonging to the bank were embezzled or abstracted by said Atherton such embezzlement or abstraction was the result of the neglect and carelessness of the cashier, and other officers of the bank, in failing to observe and enforce their rules and by-laws. He further alleged in his answer, that, before he signed the bond as surety, the bank, through its officers, had been informed that Atherton was suspected of having appropriated moneys to his own use belonging to the Bank of the State of Missouri, in which he had been employed as teller or book-keeper; that the defendant did not know and was not informed by any of the officers of the bank, or in any other way, that Atherton had been so suspected; that if he had known, or had any suggestion or intimation of the fact, he would not have become security in the bond, and he claimed

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that by the concealment of the fact by the directors and officers of the bank the bond was, as to him, void.

On motion, the court struck out all that part of the answer which related to the non-observance by the bank of its rules and by-laws, and also which set up as a defence the concealment by the officers of the bank that Atherton had been suspected of appropriating to his own private use money belonging to the Bank of the State of Missouri.

The trial was before a jury, and on behalf of the defence Armstrong offered to prove by Atherton that the embezzlement or abstraction of the money took place whilst he was acting as teller under a previous appointment and before the giving of the bond on which Armstrong was security. The evidence was rejected by the court on the ground that Atherton was a co-defendant and therefore incompetent. The jury rendered a verdict in favor of the plaintiff for \$6,666.66, being one-third of the amount of the penalty of the bond on which judgment was entered. It is now insisted that the court erred in striking out part of the defendant's answer; that the release of West and Carr, the co-securities, discharged the defendant from all liability on the bond; that Atherton was a competent witness, and that improper and conflicting instructions were given.

We cannot accede to the first proposition of the counsel for the defendant, that he is exonerated by reason of the negligence of the cashier and directors of the bank in failing to make frequent examinations of the affairs of the bank, to count the money, inspect the books, and generally to watch over its concerns. Their duties were, perhaps, not as diligently performed as they ought to have been, but the rules and by-laws were simply directory. They were intended to prescribe the duties of the cashier and directors, and a faithful compliance with them would no doubt result indirectly in favor of the sureties, by tending to an early and speedy disclosure of fraud; yet a failure to comply with them cannot be held as a precedent condition to the sureties' liability.

The principle contended for would have the effect to de-

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prive a corporation of all remedy against one agent on account of the negligence or default of another. The cashier might excuse himself by pleading the failure of the directors to perform their duty, and the directors would excuse themselves by showing that the cashier had been guilty of neglect and omitted to execute the trust devolved upon him. The case of the *People v. Jansen*, 7 Johns, 332, seems to countenance the idea contended for, but the case was an innovation on the common law rule, and has not been favorably regarded. It has not been followed in the State of New York and must now be considered as overruled—*The People v. Berner*, 13 Johns, 383; *People v. Russell*, 4 Wend. 570; *U. S. v. Kirkpatrick*, 9 Wheat. 720; *U. S. v. Van Zant*, 11 Wheat. 124; *Minor v. Mechanics' Bank*, 1 Pet. 46; *State Bank v. Locke*, 4 Den. 548; *Amherst Bank v. Root*, 2 Metc. 522.

Provisions by law that agents shall account and honestly and faithfully perform their duties, or bonds taken by corporations for the same purpose, are made by the government or by corporations for their own security; but they constitute no part of the contract with the surety, nor can he take advantage of a neglect or a breach committed by others.

The release by the bank of West and Carr did not discharge Armstrong from his obligation on the bond. The two former had paid two-thirds of the debt, the amount for which they were liable, and their release did not enure to the exoneration of Armstrong from liability.—*R. C. 1855*, p. 873, § 14; *Dodd v. Winn*, 27 Mo. 501. Nor do we think that the omission of the bank, through its officers, to inform Armstrong that Atherton had been suspected of abstracting or appropriating money while connected with the Bank of the State of Missouri, constituted any defence.

It is not pretended that the imputation amounted to anything more than a bare suspicion, perhaps an idle rumor, destitute of tangibility or substance, and we cannot perceive that any moral or equitable obligation rested on the bank to make the disclosure. Had the charge assumed positive criminal form and shape, and had it been fraudulently con-

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cealed to obtain the defendant's signature of suretiship, the case might be very different. But there is no such allegation.

The question of the competency of Atherton's evidence is next to be determined. The constant tendency of legislation has been to alter the rules of evidence so as to modify or abolish the many grounds that existed at common law to render witnesses incompetent to testify in many cases and for many reasons, till, at last, nearly all the barriers are thrown down. The act of 1855 destroyed the disability on account of interest, but still disqualified parties to the record. By the bill supplementary to the act concerning witnesses, approved December 1, 1855, (Sess. Acts 1857, p. 181,) it is provided that a party may be examined as a witness in behalf of his co-plaintiff, or of a co-defendant, as to any matter in which he is not jointly interested, or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint verdict or judgment can be rendered. The construction of this act has been several times before this court, but the best considered and most satisfactory case that we have found is *Robertson v. Findley*, 31 Mo. 384. That was a case very similar to this; the principal and security were jointly sued on the bond; the principal failed to answer and let judgment go by default, and the security offered him as a witness in his behalf to prove a fact which tended to release him from liability. The court held him a competent witness, and said that the defence relied on by the security concerned him alone, went to his personal discharge, and was one in which his co-defendant was not jointly interested or liable with him.

The matter set up, if sustained, would not affect the liability of the principal; the transaction, as to him, would remain unimpeached, and his obligation would remain in full force. Atherton's liability was admitted on the record, judgment had gone against him by default, and, so far as he was concerned, the transaction was past and completed. Whatever might be the liability of Armstrong, Atherton could not

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be affected. Armstrong's complete or partial release from the non-payment of the debt would not operate to discharge him. It is a case in which a several or separate judgment can be rendered, for which reason Atherton is a competent witness.

The second instruction given for the plaintiff asserts, in substance, that if between the 21st day of March, 1859, and the 25th day of April thereafter, and while Atherton was teller of the Southern Bank of St. Louis, he, as such teller, received on deposit in said bank from various parties, mentioned in the petition, sums of money; such sums of money, from the time the same were received on deposit by him as such teller became the money and property of the bank, and he and his securities on his bond under the bond were bound to the extent of the penalty of the bond for a proper use and application of the money; and that although the defendant Atherton, before the 21st day of March, 1859, and before the execution and delivery of the bond sued on, had, under a former appointment and bond as teller for the said bank, committed frauds on the bank and secretly become a defaulter, and was so at the time of the execution and delivery of the bond sued on, yet that, if after the said 21st day of March, 1859, and while Atherton was still teller for the bank, he withheld from entry on the books of the bank divers sums of money received by him and deposited in the bank as such teller, and withdrew the said sums of money so deposited, and secretly applied the same to conceal his previous defalcations, such conduct was a fraud within the conditions of the bond sued on, and Atherton and his securities were liable for the same, not exceeding the penalty of the bond.

The last instruction given for the defendant was, substantially, that if, from the manner in which the business and accounts of the bank was conducted, the precise amount of the defalcations, if there was any at all, during the period of Armstrong's liability from the 21st of March to the 25th of April, 1859, was impossible to be ascertained, the defend-



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ant Armstrong should not be prejudiced thereby, and that unless the plaintiff could satisfy the jury by the evidence that Atherton appropriated to his own use money of the depositors or belonging to the bank after Armstrong became security and the amount so appropriated, the jury should find for the defendant; and that, if the money deposited in the bank after the 21st day of March, 1859, as shown by the pass-book of the depositors read in evidence, was applied by Atherton to the payment of checks, or otherwise employed in the liquidation of the business of the bank and not entered on the cash books, for the purpose of concealing prior defalcations or embezzlements, the defendant Armstrong was not responsible for such moneys, but the securities on the prior bond.

We shall not comment on the evidence as to whether the facts show that Atherton, after the 21st day of March, 1859, from which time he was acting under the last appointment, actually abstracted and appropriated any of the money to his own use, or whether his delinquencies consisted in using the money so deposited for the purpose of concealing prior defalcations and embezzlements, though the case was argued at the bar, by the counsel on each side, solely on the latter hypothesis. Where an officer proves a defaulter, and has held the office under different appointments with several sets of sureties, it must now be conceded by established precedent that the sureties will be responsible who were on the bond at the time the defalcation occurred—*Driffin v. Boonville*, 8 Mo. 395; *Todd v. Boone County*, id. 431; *State v. Smith*, 26 Mo. 226; *Smith v. Paul's exec'rs*, 21 Mo. 51; *Drury v. Drury*, 36 Mo. 281.

The law, as laid down by the above authorities, was given by the court, but there is a direct inconsistency and conflict between the two instructions which we have referred to. One must be wrong; they cannot both be right, and it is impossible to tell on which the jury predicated their verdict. There may be different hypotheses of fact, but there can be but one theory of law. The instruction for the plaintiff tells



the jury that if Atherton, while acting as teller under a previous appointment, secretly became a defaulter, and was so when he was subsequently appointed, and, after entering on the discharge of his duties under his last appointment, he withheld from entry money received by him and deposited in the bank, and secretly applied the same to conceal his previous defalcations, such conduct was a fraud within the meaning of the conditions of the bond, and rendered the securities on the last bond liable for the full amount of the penalty. In other words, that the previous fraud or crime attached to the last transaction and transferred the responsibility to the last sureties, regardless of whether the bank was *damnified* by the act of the teller or not. The bond was conditioned for the integrity and faithful performance of his duties by Atherton, and any acts on his part in violation of these conditions unquestionably amounted to a technical breach, but the damages arising thereon would be the sum or amount lost to the bank in consequence of the breach. If he failed or neglected to honestly perform the duties of his office, yet no loss resulted to the bank, the damages could be only nominal. If he merely made a misapplication of the money in the bank to the wrong account, but did not abstract or appropriate it, we do not see that the bank was the loser by it. If the evidence shows that all the money was taken from the bank and used while he was acting under another bond, the sureties on that bond will be alone liable.

The counsel for the plaintiff, to sustain the instructions of the court below, principally rely upon the case of *Ingraham v. Maine Bank*, 13 Mass. 208. It appears in that case that one Hale was reappointed cashier of the bank, but before such reappointment he had been guilty of frauds on the bank, and afterwards, previous to an examination by the directors into the state of their cash, he borrowed money as such cashier from other banks, giving the checks of the bank for the same and placed it in the vault to conceal prior defalcations, and after the examination he took out the money

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King v. Pearce.

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and returned it to the parties from whom he borrowed it. The court held, that when Hale borrowed the money as cashier and placed it in the vault, it was the money of the bank; and when he took it out and repaid it to those of whom he borrowed it, it was an abstraction and appropriation, and could not be distinguished from an actual payment from his own funds to supply the defalcation; and his surety on the last bond was held liable. But in that case it will be observed there was an actual taking away of the money without authority.

There has been another point made here about the admissibility of certain evidence that was received on the trial, but we have seen nothing objectionable in the action of the court in admitting evidence.

For the giving of wrongful and conflicting instructions, and refusing to permit Atherton to testify, the judgment will be reversed and the case remanded. The other judges concur.



ELIZA KING, Respondent, v. ALBERT PEARCE, Appellant.

1. *Practice—Continuance.*—The ruling of the court in refusing to grant a motion for a continuance being entitled to every intendment in its favor, its judgment not revised.
2. *Agency—Contract.*—If the agent be false to his trust, or wrong his principal, the latter has his remedy; but a party trusting him in good faith, within the scope of his authority, cannot suffer thereby.

*Appeal from St. Louis Court of Common Pleas.*

G. P. Strong, for appellant.

T. T. Gantt, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The matter stated in the affidavit for a continuance, taken in connection with what transpired at the previous term, is not sufficient to warrant this court in interfering with the

ruling of the Common Pleas, overruling the defendant's application. At the previous term, the motion for a continuance was on the ground that the plaintiff and Capt. Artus were indispensable witnesses. At the term when the cause was tried, no efforts had been made to procure the testimony of these two witnesses, nor was it suggested that they were at all material; but the continuance then prayed for was on account of the absence of Hescox, and the inability to take his deposition. From a reading and inspection of the two affidavits, and looking into the matter stated as reasons for desiring the evidence of the different witnesses at the respective terms, the court might well have concluded that the motion was merely for delay. Such being the fact, and as there is no flagrant abuse of power exhibited, and the ruling of the court below being entitled to every intendment in its behalf, there is nothing here in that regard requiring a revision.

The record shows that Henly purchased the cotton as agent of defendant, and that it was actually received and appropriated by the defendant. At the time the contract was entered into and the purchase made, Henly showed plaintiff the defendant's letter of July 29, 1862, authorizing him to buy cotton, and stating that he would deposit the purchase money in bank at St. Louis, if the seller preferred it. In the unsettled state of the country where plaintiff resided, it was hazardous and unsafe to keep money, and therefore she sold, taking a receipt that the money should be paid at some future time, or deposited in bank for her use. The evidence does not afford any pretence for saying that the contract was made with the agent in his individual capacity and not with the principal. But if there was any doubt about that question, it was left to the jury under instructions in the most favorable aspect for the defendant.

If the agent has been false to his trust, or wronged his principal, the latter has his remedy; but the plaintiff, who acted in good faith, ought not to be made to suffer thereby.

Judgment affirmed. The other judges concur.

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Stevens et al. v. Mackay et al.

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GEORGE R. STEVENS AND JOHN YOUNG, Respondents, v. JOHN B. MCKAY AND JOHN S. HOOD, Appellants.

*Contract—Delivery and Acceptance of Goods.*—Where a party knowingly accepts of goods of an inferior quality delivered in pursuance of a contract, he cannot afterwards object to the quality of such goods.

*Appeal from St. Louis Circuit Court.*

The plaintiffs brought suit for \$359.80 on an agreement in writing, which read as follows:

"We, the undersigned, agree to receive from Messrs. Stevens & Young about five hundred (500) barrels *selected* jeniton apples, at Quincy, at two dollars and five cents (\$2.05) per bbl., at their cellar. Also, about one hundred barrels, same kind, at Clarksville, Mo., at one dollar and seventy-five cents (\$1.75) per bbl. Clarksville, March 13, 1862. McKay & Hood."

The defendants' counterpart of the same contract is this:

"We, the undersigned, agree to furnish Messrs. McKay & Hood about five hundred (500) barrels apples at Quincy, Illinois, at two dollars and five cents per barrel, at their cellar; also, about one hundred bbls. at Clarksville, Mo., at one  $\frac{75}{100}$  dollars (\$1.75). *All the above to be put in good, sound, merchantable order, and jenitons.* Clarksville, March 13, 1862. John Young. G. R. Stevens."

At plaintiffs' instance, the court instructed the jury as follows:

1. In the sale of personal property, the presumption of law is that the article sold is to be paid for on delivery unless there be an agreement for credit.

2. If the jury believe from the evidence that the apples in question became spoiled from any cause arising after their delivery to defendants or their agent, or in consequence of the negligence of defendants or their agent, then the unsound or unmerchantable condition of the apples (if such

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were their condition) constitutes no defence to the plaintiffs' right of recovery in this action.

3. Even though the jury should believe that the apples in question were defective in quality at the time of their delivery, or were so badly barrelled as to become spoilt in consequence thereof, yet if they also believe that the agent of defendants knew their deficiency in quality (if such there were) and the condition in which they were packed, and, notwithstanding such knowledge, accepted said apples, then the defendants have thereby waived all right of future objection on those grounds, and cannot now avail themselves thereof as a matter of defence to this action.

4. Even though the jury should believe that plaintiffs warranted the apples in question to be sound and merchantable, and further believe that said apples at the time of their delivery to the defendants, or their agent, at plaintiffs' cellar in Quincy, were sound and merchantable, then the subsequent condition of said apples constitutes no defence to the plaintiffs' right of recovery.

5. It is a question for the jury to determine which of the two papers read in evidence, and purporting to be the contract between the parties, is in point of fact the contract between them; and if the jury find that the paper read by plaintiffs embodies the entire contract between the parties, the jury are instructed that the same is not in law necessarily a warranty of the apples.

The defendant excepted to the giving of these instructions for plaintiffs, and asked the court to instruct as follows, which the court did:

1. On the counter-claim of defendants against the plaintiffs, the jury are instructed that they can under the evidence find in favor of the defendants what damages they may have sustained (if any) by reason of the failure of plaintiffs to furnish a sound and merchantable article of apples under the contract (if such was the contract), and there was a failure to furnish such apples.

2. If the jury believe and find from the evidence that the

contract given in evidence by the defendants is a counterpart of the same contract given in evidence by the plaintiffs and was executed by the plaintiffs, and that it was under this contract that the apples were furnished by plaintiffs, then by the terms of said contract the said apples, when to be delivered, were to be put in a good, sound and merchantable condition.

3. If the jury believe and find from the evidence that the apples (if any) furnished under said named contract were not, when furnished, put in a good, sound and merchantable order, then the plaintiffs cannot recover the contract price therefor.

4. The court instructs the jury that the word "selected" may imply a warranty of the apples, if such was the intention of the parties to the contract. The word "warrant" need not be used, nor any other of precisely the same meaning; it is enough if the word or words actually used import an undertaking on the part of the vendor that the chattel is sound and merchantable, or an equivalent to such an undertaking.

[For No. 5, see opinion.]

6. If the jury believe and find from the evidence that by the terms of the contract made and entered into by them, the plaintiffs agreed to furnish apples, and put the same in good, sound and merchantable order for the defendants, but failed to do so, they cannot then recover the contract price therefor, or more than the property is shown to have been reasonably worth.

7. If the jury find from the evidence that the apples referred to were of a bad, unsound and unmerchantable quality, then the plaintiffs cannot recover the contract price therefor, but only what such apples are shown to have been worth; and if the jury find that the defendants have paid on account of said apples more than they were worth, then the jury will find in favor of the defendants on their counter-claim against the plaintiffs to the extent of such over-payment, and interest thereon from the commencement of this suit.



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FAGG, Judge, delivered the opinion of the court.

The counsel for the appellants really insists upon only two grounds for the reversal of the judgment in this case. The first is that the court gave inconsistent and conflicting instructions; and second, that the third instruction given for the plaintiffs was not warranted by the evidence. An examination of these two points will not require an extended statement of the case.

It seems to have been a suit instituted in the Circuit Court of St. Louis county to recover of defendants a balance of three hundred and fifty-nine and  $\frac{89}{100}$  dollars, alleged to be due and owing to the plaintiffs upon a contract for the sale and delivery of a certain number of barrels of apples at the city of Quincy, Illinois, and also at Clarksville, Mo. The verdict and judgment was for the amount claimed, and the defendants bring the suit here by appeal.

The court gave all the instructions asked for by both parties, and the inconsistency complained of is alleged to exist in plaintiffs' fifth instruction and the one of the same number asked by defendants.

A memorandum of the contract signed by the defendants was declared upon and fully set out in the petition. The defendants set up in their answer and produced on the trial a counterpart of the same, the two differing somewhat in phraseology. This difference between the two instruments, it is claimed, was not harmonized by the instructions. It is insisted that the two taken together are so inconsistent and conflicting as to destroy each other, and to leave the jury without any judicial construction of the contract between the parties.

It was certainly improper to leave it to the jury to find as a fact in the case, which of the two instruments contained the entire contract between the parties; and if the instruction of the plaintiffs stood alone upon that point, we should have no hesitation in declaring it to be erroneous.

But the instruction given at the instance of the defendants furnishes a sufficient solution of the difficulty, by defining



the meaning of the word "*selected*" as used in the instrument set out in the petition, so as to make it harmonize with the condition and quality of the apples as called for by the terms of the instrument introduced by the defendants, and relied upon as the contract. The first described the fruit to be delivered as "selected jeniton apples"; the second, after stating the number of barrels to be delivered at the two points respectively, says they are "to be put in good, sound, merchantable order, and jenitons." We conclude, therefore, that defendants' instruction, to a certain extent, corrected the error committed by the one given for plaintiff. It is as follows:

"5. The word 'selected,' as used in the contract, does not mean merely that the article of apples was to be chosen out or set apart, but that they were to be selected with reference to their being of merchantable value and proper subjects of trade."

This was a judicial determination of what constituted the entire contract between the parties, and the construction of the two instruments thus taken together placed the question before the jury in a light as favorable as the defendants could have desired.

The next point of objection is the third in the series of instructions given for plaintiffs. It is predicated upon the idea that there was evidence in the cause tending to show a delivery of the apples at Quincy; and if so delivered and accepted by the defendants or their agents, then all inquiry as to the actual condition of the fruit at that time was precluded by such delivery and acceptance. We think that the instruction was warranted by the evidence preserved in the record, and, as these were facts for the jury, and passed upon without misdirection by the court, the finding must be taken to be conclusive.

Upon a view of the whole case as presented by the record we find no errors sufficient to require a reversal of the judgment, and it must therefore be affirmed. The other judges concur.

JOHN C. POTTER, Respondent, v. ANDREW J. L. STEVENS, Appellant.

1. *Fraudulent Conveyances—Purchasers—Grantee.*—A party accepting a conveyance of land made in fraud of creditors, for the purpose of assisting the debtor in his fraudulent acts, although he pay full value for the property, will be treated as a partaker in the fraud, and the conveyance will be held to be fraudulent and void.—Potter v. McDowell, 31 Mo. 62.
2. *Fraudulent Conveyances—Purchaser without Notice—Mortgagee—Assignment of Debts.*—A mortgage is in equity considered as a security for the debt, and a transfer or assignment of the debt, or any part thereof, transfers the mortgage *pro tanto*. A mortgagee is a purchaser under the act relating to fraudulent conveyances.
3. *Practice—Parties.*—A judgment was rendered against a defendant as a fraudulent grantee avoiding a deed made to defraud the creditors of the grantor, without making the holders of the notes secured by the grantee's mortgage or deed of trust parties to the suit. *Held*, that as the holders of the notes were not made parties, their interest could not be affected by the decree, and that, under the circumstances, the point not having been raised in the lower court, the court would not reverse the decree setting aside the fraudulent conveyance.

*Appeal from St. Louis Circuit Court.*

*Cline & Jamison*, for appellant.

I. Though the deed in controversy from McDowell to Stevens may have been fraudulent in fact as to both those parties, yet if these note holders stand in the position of subsequent purchasers in good faith without any notice that such original conveyance was fraudulent, they take a good title to the extent of their interest to the property, and are unaffected by the nature of the original deed as regards both the grantor and grantee—R. C. 1855, p. 803, § 3.

There is no intimation in the case that these note holders had any knowledge or notice that the conveyance from McDowell to Stevens was fraudulent, or that they knew that the deed of trust from Stevens to McDowell to secure payment of the notes was fraudulent; so that, if they are to be regarded as purchasers in the sense of the statute and of the above cases, they are also innocent purchasers.

II. The transfer of the notes to the present holders made

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them such purchasers.—Anderson v. Baumgartner, 27 Mo. 80; Thayer v. Campbell, 9 Mo. 277; Keyes v. Wood, 21 Vt. 331; 1 Hill. Mortg., ch. 11, § 10.

The fact that some of these holders took their notes as collateral security for antecedent debts does not affect their rights; they are, having taken the same before maturity and without any notice of any infirmities attached to them, under the decisions of this State and of almost every State in the Union, regarded as good faith holders for value—Grant v. Kidwell, 30 Mo. 455; Swift v. Tyson, 16 Pet. 19, 20, 22; Blanchard v. Stevens, 3 Cush. 168; 26 Vt. 568; 1 Zab. (N. J.) 667; 11 Ohio, 191-2; 1 Smith, (Ind.) 89; 8 Cal. 266; Sto. on Bills, § 192.

The case then stands as though this property had been carved up into five different mortgages for the benefit of the creditors, being the five note holders in question, four of whom still remain unpaid; that is, as to them the mortgage is still outstanding. And it can make no difference whether these note holders be regarded as deriving their title as mortgages immediately from Stevens, or from Stevens through the intervention of McDowell as payee and endorser of the notes. A party can as well take a good title from a fraudulent grantor as from a fraudulent grantee, provided he be himself an innocent purchaser for value—Wheaton v. Sexton, 4 Whea. 507; Pope v. Andrews, 1 Sm. & M. 135; Storer v. Hemington, 7 Ala.

And it is well settled that a mortgagee is a purchaser to the extent of his interest in the premises within the meaning of the term "purchaser" as used in the statute of fraudulent conveyances—Ledyard v. Butler, 9 Pai. Ch. 137, and numerous cases there cited.

III. These note holders should have been made parties to the suit before the court could proceed to set aside the deed in controversy.—Sto. Eq. Pl. § 75.

And in numerous cases it is declared to be incumbent on the court, when a decree will have the effect of depriving third parties of their legal rights, to notice the fact at the

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hearing and cause them to be brought in, and that the court ought to order the cause to stand over to make the plaintiff bring such necessary parties before the court; and that it is an error that will be fatal, though the objection may not have been made at any time before the hearing in the appellate court.—*Shaver v. Brainard*, 29 Barb. 25; *O'Brien v. Heeny*, 2 Edw. Ch. 242; *Morse v. Water-power Co.*, 42 Me. 119; *Felch v. Hooper*, 20 Me. 159; *Clark v. Long*, 4 Rand. 451; *Woodward v. Wood*, 19 Ala. 213; *Prentice v. Kimball*, 19 Ills. 320.

*Knox & Smith*, for respondent.

FAGG, Judge, delivered the opinion of the court.

This was a proceeding instituted in the St. Louis Circuit Court for the purpose of declaring null and void a deed to certain property in the city of St. Louis, familiarly known in this case as "the St. Ange property." The deed was executed on the 31st of March, 1858, by John McDowell and wife, conveying said property to the appellant Stevens for the consideration of \$25,000, and for which five several notes were executed at the time and delivered. The notes were due and payable respectively in one, two, three, four and five years. The plaintiff Potter asked to have this conveyance declared null and void, and for a decree divesting the title to the premises in question out of said Stevens and vesting the same in him.

The firm of Potter, Nute, White & Bagly, of which this plaintiff was a member, instituted a suit by attachment against the said McDowell on the 7th day of April, 1858, upon the ground that this conveyance had been fraudulently made so as to hinder and delay his creditors. That case was before this court by appeal, and may be found reported in 31 Mo. 62. The court at that time virtually disposed of all the questions growing out of this transfer to Stevens, and the judgment was reversed and the cause remanded. The plaintiffs prosecuted their suit to final judgment, and at the

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sheriff's sale under execution in their favor this plaintiff became the purchaser of the property in question.

At the trial below, it was shown that the five notes before mentioned had been transferred before maturity to different parties; that one of them was assigned by McDowell to one Andrew Christy in the month of April, 1858, and had since been paid off and discharged by Stevens; the remaining four notes had been placed in the hands of other parties by the assignment of McDowell, to be held as collateral security for amounts alleged to be due and owing to them by him. One of these notes, payable four years after date, was held by the administrator of the estate of W. H. Dorsett, deceased, but the time of its assignment is not shown; another, payable two years after date, was held by Rich'd H. Stevens, brother of the appellant in this case, and is said to have been transferred in 1858, but the precise time is not shown; the others, payable in three and five years, were transferred in the months of February and March, respectively, in the year 1861, nearly three years after the commencement of the attachment suit.

The determination of all the questions in this case as between Potter and Stevens in the court below, we consider fully warranted by the opinion of this court in the case of Potter et al. v. McDowell, 31 Mo. 62, and the evidence introduced on the trial. The books furnish no clearer case of fraud in the conveyance of property than the one at bar, and we may now as well as at any other point dispose of the appeal which has been urged in behalf of Stevens upon the ground that he has actually paid off a portion of these notes. We cannot see how this fact would entitle him to any equitable consideration here. Even if he had paid in money to McDowell the full consideration of the property, yet if he was thereby aiding and assisting McDowell to carry out a fraudulent design as to his creditors, Stevens would be held to be a participator in the fraud and could reap no benefit from the purchase. The deed would be treated as null and void, and he must abide the consequences even though they should extend to the loss of all he had paid. So here hav-

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ing by his act assisted McDowell to make a conveyance found to be fraudulent and void, even though he has paid a part of the consideration named in the deed to a holder of the note unaffected by any notice of the fraud, it is one of the consequences growing out of his own fraudulent act, and gives him no standing whatever in a court of equity.

The principal ground, however, which seems to be relied on for a reversal of the judgment in this case, is the alleged want of the parties necessary to a full and complete determination of the cause. This point seems to be raised here for the first time in the progress of the cause. There was no demurrer to the bill, no objection at the trial, and no suggestion by the court as to the want of parties. There is no doubt as to the fact that the failure to bring in the proper parties so that a full determination of the whole case can be had, is a defect that may be cured at any time before making the decree. The authorities are equally clear to the point that want of necessary parties is a good ground for the reversal of the judgment on appeal—Sto. Eq. Pl. § 75; *Clark v. Long*, 4 Rand. 451; *Woodward v. Wood*, 19 Ala. 213; *Felch v. Hooper*, 20 Me. 159; *Morse et al. v. Machias Water-power & Mill Co.*, 42 Me. 119. Many other authorities might be cited if necessary.

After all, these authorities do not precisely meet the difficulty in the case. It may be admitted for all the purposes of this case, that the holders of these outstanding notes are fully entitled to all the benefit to be derived from the deed of trust executed by Stevens to McDowell to secure their payment; that they occupy the position of purchasers in good faith and without notice of the fraud as between McDowell and Stevens, notwithstanding the fact the notes in question are only held as collateral security for debts due by McDowell to the several holders. It is a well recognized principle of law that the transfer of a debt secured by mortgage carries the security with it as an incident to the debt, and this is true whether the transfer is intended to be abso-



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lute or otherwise—Taylor v. Campbell, 9 Mo. 277; Keyes v. Wood, 21 Mo. 331; Anderson v. Baumgartner, 27 Mo. 80.

It may be further admitted that they were within the jurisdiction of the court, and not embraced within any of the exceptional cases in which it is usually held, that, on account of interest in the subject matter of the suit, or to avoid further litigation, the court might nevertheless proceed to make a final decree. The question still recurs, were they necessary parties within the requirement of our own statutes, or the rules which prevail uniformly in chancery practice? Is their interest in the controversy between Potter and Stevens of such a character as to be affected by the decree asked for, or necessary to a full and complete determination of the whole case? It is very clear that they could not be bound by any judgment or decree in a proceeding to which they were not made parties. Their rights could not be concluded in this way, and therefore the necessity for making them parties to the suit must rest upon the consideration of preventing further litigation.

But we cannot say in this case, when the reversal of the judgment is made to depend alone upon the fact that these persons were not made parties simply because they might have been, that it is such an error as will require it to be sent back for further trial. Assuming that they are innocent holders and unaffected by notice of fraud, still they can only look to this property as a mere security for their several debts. There is no pretence that their interest in it amounts to anything more than this.

The plaintiff in this case, if he preferred to do so, might pay off these debts and relieve the property from the encumbrance. These parties may not be compelled to resort to this security for their protection. From all that appears in the testimony, Stevens is amply good for the amount of the notes, and it seems that suit has already been instituted against him on one of them. So that we are not warranted in concluding that the necessary office of decreeing



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the deed to be void as to plaintiffs could operate to the prejudice of these parties, more especially as these were shown to have been witnesses in the cause. We must infer that they had some knowledge of what the plaintiff was seeking to accomplish by his action against Stevens. It was not pretended by them, or any person for them, that they relied upon this security for protection; and we do not feel authorized, upon the bare presumption that these parties may have an interest directly to be affected by this proceeding, to reverse the judgment and remand the cause for further trial.

No specific rule of practice can be laid down in cases like the present. The necessity of adding other parties where their interests would seem to require it, or for the purpose of preventing a multiplication of suits, must depend, at last, upon the facts and circumstances of each particular case.

All of the other questions in the case were correctly settled, and the judgment must be affirmed. The other judges concur.



CAVENDER & ROWSE, Appellants, v. STEAMBOAT FANNY BARKER, Respondent.

1. *Boats and Vessels—Courts—Jurisdiction—Admiralty.*—Stores and supplies furnished to a steamboat at the home port in this State do not give an admiralty or maritime lien so as to oust the jurisdiction of the courts of this State, and the remedy given by our statute may be enforced against the boat by name. See *post* Boylan et al. v. St. Bt. Victoria, Hogan et al. v. St. Bt. Minnie, and Connolly v. St. Bt. Bee.
2. *Boats and Vessels—Seamen's Wages—Stores and Supplies.*—A party claiming a lien upon a boat upon account of moneys advanced to pay for wages due, or stores or supplies, must show that the money was advanced with the understanding that it should be used specifically for the purchase of supplies, for which the statute gives a lien. See *post* Gibbons et al. v. St. Bt. Fanny Barker.

*Appeal from St. Louis Circuit Court.*

The "Fanny Barker" having been sold by order of the St. Louis Circuit Court, notice was published requiring all per-

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sons having lien claims to file the same in said court. Pursuant to such notice, the appellants on the 4th day of October, 1866, filed an account containing one item, viz., "supplies, consisting of moneys furnished for the use of said steamboat at the request of the agent thereof, \$10,000.

On the 18th of October they filed an amended account for \$4,262.88, "moneys advanced for purchasing supplies, paying wages, &c., at the request of the agent of said boat." The last account alleges that the money was advanced upon several days therein stated, in various sums, commencing on the 2d day of January, 1866, and ending on the 29th March of same year.

The appellants went to trial upon the last mentioned account for \$4,262.88, without any pleadings being made up. A large number of lien creditors appeared (as well as her then owner, but who had purchased her subsequent to the time when the alleged demand of the plaintiffs accrued) and contested plaintiffs' recovery.

It appeared upon the trial (by the court) that the respondent was one of thirteen boats belonging to the "Johnsonville Packet Company"; that said company, on the 2d of January, 1866, borrowed \$10,000; on the 4th of said month, \$10,000, and on the 8th of January, 1866, \$10,000. All these sums were loaned upon the notes (which notes were not, nor were any of them surrendered, or offered to be surrendered, at the trial) of said company, endorsed by Nolan & Caffrey, and for which loans stock of said company amounting to \$100,000 was hypothecated to the plaintiffs as security; also, that these loans were procured through the agency of one Stephen Haskell, the agent of said company in procuring the January loans, but had no authority except to sell the notes upon their own credit and that of the pledge of stock.

It further appeared that on the 24th day of March, 1866, said Johnsonville Packet Company borrowed \$5,000 from claimants upon the notes of the company, endorsed by Nolan & Caffrey; all these notes had been renewed except that dated January 8, 1866, which was paid at maturity.

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Rouse, one of claimants, testified that said Haskell informed him of the purpose for which the January loans were wanted, and that the claimants obtained the money upon the credit of the property of the company, including its thirteen boats and its barges; but one witness testified that said Rouse had informed him that he (Rouse) had made said January loans upon said stock at the rate of thirty cents on the dollar. Witnesses Caffrey and Rouse testified that the loan made March 24, 1866, was needed that afternoon to pay off laborers, deck hands, &c., in order to enable the company to send off two boats the same evening.

The claimants examined Frank Knoble, treasurer and bookkeeper of said Johnsonville Company: who stated that he received the proceeds of said loans, less the discount; that he could not tell from the books of the company how any of the money thus raised was used; that it was collected and paid out as other money belonging to said company, &c.—There was no evidence as to the application of the money, or that any part thereof was used by the respondent. At the close of the case, they asked the following instructions:

1. If it appear from the evidence that the claimants advanced to the Johnsonville Packet Company divers sums of money, from time to time, in January and in March, 1866; that said packet company was then the owner of a line of steamboats of which the "Fanny Barker" was one, and which boats were used in navigating the waters of this State; that said advances, or either of them, were made by the claimants upon the representations of the company, or its agents, that the money was needed "to keep the steamboats running," or to meet current expenses of navigating them, or for the purchase of supplies, then the said advances constitute a lien upon said steamboat Fanny Barker to the extent to which they were applied to her use and benefit.

2. If it appear from the evidence that the Johnsonville Packet Company had a common fund composed partly of money borrowed from the claimants in the manner, upon the representations and for the purposes stated in the forego-

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ing instruction, and partly from money derived from other sources, that said packet company used said common fund indiscriminately to pay its indebtedness and to furnish its boats with the means of running in their ordinary business, the presumption is that the money borrowed of claimants was used as far as necessary for the last named purpose, and it should be considered to have been so applied.

The court refused all said instructions, and, of its own motion, gave the following :

"The court decides as the rule of law governing this case, that money advanced to pay the debts of a boat already accrued for running expenses or supplies, gives no lien upon the boat ; but that to establish his right to a lien the claimant must show affirmatively that he advanced his money to pay future expenses or for supplies yet to be furnished ; and if the claimant thus establishes his right, it is no valid objection to his claim that the same owner had several boats to whom the claimant made such advances for all the said boats, without designating the amounts to be used by each, provided the amount used by or for each boat is satisfactorily shown ; and then the lien against each boat is to the extent of the advance used for its benefit."

The claim was rejected.

*S. Holmes with Harding*, for appellants.

Money loaned to a vessel to procure supplies, or to pay off a lien debt for supplies still subsisting, will constitute a new lien in favor of the lender. The court below decided the converse of this proposition in declaring the law to be, that "money advanced to pay debts of a boat already accrued for running expenses or supplies, gives no lien upon the boat ; but that to establish his right to the lien the claimant must show affirmatively that he advanced the money to pay future expenses."—*Phelps v. St. Bt. Eureka*, 14 Mo. 532 ; *St. Bt. Lebanon v. Grevison*, 10 Mo. 537 ; *Doans v. Child, Davis' U. S. Dist. Ct. R. 71* ; *Abb. on Ship. 177* (Am. ed.)

A party furnishing supplies is not bound to prove that he

looked to the lien as a security for his debt, or that he made his advances upon the faith of it, or that he contracted for a lien at the time.—*The Gustavia*, 2 Blatch. & Howl. 189.

The statute creates the lien upon the mere fact of furnishing the supplies, without more. The creditor's intention has nothing to do with the operation of the law. To be sure, he may never avail himself of the lien; he may release in terms, or he may act so as to divest it, or by doing something inconsistent with his right to enforce it.—*Barge Resort v. Brooke*, 10 Mo. 532.

The court will look to the maritime law for the principles of its decisions, our statute being thence borrowed—*St. Bt. Raritan v. Smith*, 10 Mo. 527; 1 Pars. Mar. Law, 501; *Gardner et al. v. Ship New Jersey*, 1 Pet. Adm. R. 226.

By the express terms of our statute, the contracts of the owner for supplies are put on the same footing and are governed by the same principles as contracts by the master, so far as the creation of the lien is concerned—R. C. 1855, tit. Boats and Vessels—*Ship Racket*, 3 Mason, 255.

It is clear by the general maritime law that a party whose goods are sold for supplies has a lien on the ship. *Bee Adm. R. 116*; *ibid.* 264—the master has the same lien for advances made by him, which may be enforced in admiralty.—*Emerigon on Mar. Loans*, ch. 12, § 4, p. 234.

It appears from the cash book that money was used by the boat, subsequent to the loan, for these three purposes:—1. To return charges collected by the boat and used to pay expenses; 2. To pay for supplies already furnished to the boat; 3. For future expenses. In the first case, a lien is created by general maritime law—*vide* case of ship *Racket*, above cited; in the 2d, the case of the *Eureka* is in point; in the 3d, there can be no question whether the money borrowed was properly appropriated or not.

*Pride of the West*, 12 Mo. 371—the court there says, “If the purpose for which the money is borrowed is made known at the time, a subsequent misappropriation will not affect the lien.” It is not necessary for the material man to show that

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the supplies furnished were really necessary—*The Gustavia*, Blatch. & Howl. 189.

*Rankin & Hayden*, for respondent.

The evidence in this case shows conclusively that the claimants discounted from time to time the notes of the Johnsonville Packet Company, endorsed by Nolan & Caffrey; and that such discounts were made upon the faith and credit of said endorsers and \$100,000 worth of the stock of said company. That such loans or discounts were procured by, and made to and under contract with, one Stephen Haskell, who was only authorized to negotiate said notes for said Johnsonville Company, and in no other sense an agent of the company.

There is no proof that the claimants advanced one dollar to the Fanny Barker, or her master, owner, agent, or consignee, for her crew; nor is there any evidence that they advanced or furnished any money for such purposes as the law could give them a lien for.

The demand to be a lien on the Fanny Barker must be a debt contracted by her master, owner, agent, or consignee, and must be for supplies furnished for her use, or for such purposes as the law confers a lien therefor.—*R. C. 1855*, p. 303; *Childs v. St. Bt. Brunette*, 19 Mo. 518.

All the notes were renewed from time to time; they were not produced at the trial, nor was the offer made to cancel or surrender them. This is a full defence to plaintiffs' case.—*St. Bt. Charlotte v. Lumm*, 9 Mo. 63; *Ramsey v. Allegre*, 12 Wheat. 64; 29 Vt. 165. The court declared the law of the case correctly—*Gen. Brady v. Buckley*, 6 Mo. 558; *Bryan et al. v. Pride of the West*, 12 Mo. 371; *Bailey v. St. Bt. Concordia*, 17 Mo. 357.

The first instruction asked by appellants was properly refused. 1. Money advanced to the owner of a line of steamboats to keep them running, or to meet the current expenses of running them, constitute no lien on any of said vessels. 2. The application of the money, thus loaned, to the use of



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any particular vessel of the line, cannot affect the question of lien or no lien ; that question must be determined from the facts and circumstances existing, when and upon which the money was advanced.

The same objections apply to the second instruction asked by the appellants, as well as the following : " Had the court jurisdiction of this case to enforce the new boat and vessel act ? Is that act unconstitutional as applied to this case ? " These questions are submitted to the court under the decision of the Supreme Court of the United States in the case of *Ad. Hine v. Trevor*, No. 178, Dec. term, 1866, 4 Wal.

WAGNER, Judge, delivered the opinion of the court.

When this case was called for argument, a question was raised as to the jurisdiction of this court touching the subject matter. The doubt was suggested on account of a decision rendered by the Supreme Court of the United States, at its last December term, in the case of steamboat *Ad. Hine, v. Trevor*. The main point ruled in that case is, that wherever the District courts of the United States have original cognizance of admiralty causes by virtue of the act of 1789, that cognizance is exclusive, and no other court, State or National, can exercise it, with the exception always of such concurrent remedy as is given by the common law. The facts in the case were, that a collision occurred between the steamboats *Ad. Hine* and *Sunshine*, on the Mississippi river, at or near St. Louis, in which the latter vessel was injured. Some months afterwards, the owners of the *Sunshine* caused the *Ad. Hine* to be seized while she was lying at Davenport, Iowa, in a proceeding under the laws of that State, to subject her to sale, in satisfaction of the damages sustained by their vessel. The owners of the *Ad. Hine* interposed a plea to the jurisdiction of the State court, which being ruled against them, they carried the cause to the Supreme Court of the United States, where the decision of the Supreme Court of Iowa was reversed and the cause remanded, with direction to dismiss the same for want of jurisdiction.



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This matter being brought up just at the close of the present term, we are precluded from going into a general examination of the question, and will attempt nothing more than to state our conclusion. There can be no doubt that the remedy pursued in the case of the *Ad. Hine* in the Iowa courts was essentially an admiralty proceeding *in rem*. The collision occurred on the navigable waters of the United States, beyond and without the jurisdiction of Iowa, and the courts of that State assumed cognizance over the cause. It is, we suppose, settled that the admiralty jurisdiction of the United States District courts embraces all maritime contracts, torts, injuries, or offences. But the question is, what contracts or what torts are maritime? A learned writer on this subject says: "We may say that within this term are certainly included salvage, bonds of bottomry, respondentia, or hypothecation of ship and cargo; seamen's wages; seizures under the laws of impost, navigation or trade; and cases or questions of prize or ransom. Nor should we hesitate to place, with almost equal certainty with these, all charter parties and contracts of affreightments on voyages made between different States."—2 Pars. Mar. Law, 509. Maritime contracts, in the sense used in admiralty practice, originated partly in necessity and partly in convenience. A contract may be a land contract, although it relates to a ship, or a boat, or a cargo, or voyage, unless every contract is necessarily maritime which relates to property which is water-borne, and we do not think that the word has, in law, such an extensive signification. Judge Leonard, in *Hays v. St. Bt. Columbus*, 23 Mo. 232, speaks of the statute as constituting secret, tacit mortgages upon the boats, rather than liens in the common law acceptation of the word, being unconnected with the possession. The proceeding is *in rem* against the boat, but the Legislature might authorize that remedy if the State courts were not prohibited from taking jurisdiction. The case here exclusively concerns our own citizens. The contract was made with the owner in the home port, and we do not believe that it is so essentially mar-

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itime in its character as to make it solely cognizable in the United States District courts, or to deprive the State courts of jurisdiction under the statute. We frankly admit that, after perusing the opinion of Judge Miller in the case of the *Ad. Hine v. Trevor*, we have arrived at the conclusion with some hesitation, and we are gratified that from this decision the parties may, if they see proper, have this question, which is now for the first time raised, finally determined and set at rest.

The plaintiffs base their claim on the second subdivision of the first section of the statute concerning Boats and Vessels, which provides that every boat or vessel used in navigating the waters of this State, shall be liable and subject to a lien for all debts contracted by the master, owner, agent, or consignee of such boat or vessel, on account of stores or supplies furnished for the use thereof, or on account of labor done or materials furnished by mechanics, tradesmen, or others, in the building, repairing, getting out, furnishing or equipping thereof. The defendant was one of the boats belonging to what was known as the "Johnsonville Packet Company," an incorporated company, and one Haskell, a bill broker, was the financial agent for procuring loans for the company. The plaintiffs made their loans to the company through Haskell, and received as security a hypothecation of stock, and the money was paid into the general treasury.

The president of the company and Rowse, one of the plaintiffs, testified that the last loan, which was made March 24, 1866, was needed on the afternoon of that day to pay off laborers, deck hands, &c., in order to enable the company to send out two boats the same evening. Wages due hands or persons employed on board of the vessel comes within the first clause of the section, and it is not shown that the defendant was one of the boats which was to be started out, so as to entitle the claimants to a specific lien if the case otherwise authorized it, but, on the contrary, it plainly appears that the money was loaned generally to enable the vessels to prosecute their voyages.

Haskell, in negotiating the loans for the use of the company, was not an agent to bind the boat within the meaning of the boat and vessel act; but it was competent for the owner to bind the boat, and the act of the agent was the act of the owner. The money was borrowed by the company and paid into its treasury, and used to pay the general running expenses of the boats. There is no evidence to show that it was advanced with the understanding that it should be used specifically for the purchase of supplies, &c., for which the statute gives a lien. This brings the case within the principle of *Gibbons et al. v. the same defendant*, decided at this term.

The instructions asked for the plaintiffs were erroneous, and the court committed no error in refusing them. The instruction given by the court of its own motion is exceptionable, but, as no injury resulted from it, we order that the judgment be affirmed. Judge Fagg concurs; Judge Holmes, being related to one of the parties, did not sit.



THOMAS BOYLAN AND WILLIAM P. GETTYS, Respondents, v.  
THE STEAMBOAT VICTORY, Appellant.

1. *Courts—Jurisdiction—Boats and Vessels.*—A contract made at the home port of a boat or vessel with the master or owner for supplies furnished to such vessel, is a land contract made and completed within the body of a county, and the courts of this State have jurisdiction to enforce such contract against the boat or vessel by subjecting it to sale as provided by the statute—Gen. Stat. 1865, ch. 193. Such a contract is not within the exclusive jurisdiction of the admiralty.
2. *Boats and Vessels—Limitations—Accounts.*—Where it is specially agreed or impliedly understood between the parties that an account is to be kept open and continued as one account, the limitations will commence to run from the last item of the account.
3. *Boats and Vessels—Evidence—Admissions.*—The admissions of an owner are admissible in evidence in a suit against the boat.

*Appeal from St. Louis Circuit Court.*

This is a suit brought for supplies furnished. The petition was filed on the 29th January, 1866. The date of the

first item of the account was August 30, 1864—for cash advances to the owner for buying stores and supplies for the boat, \$500. The account then ran through September, October, and up to November 24, 1864, including an item of the date of November 12, of \$1,500, for cash advanced to the owner for the purpose of buying stores and supplies for the boat. The next item was of date May 8, 1865, with various items running through May, June, July, August, September and October, 1865—the account closing October 17, 1865—the demand consisting entirely of charges on one side, with no credits from August, 1864, to August, 1865.

Joseph Gray, one of the owners of the boat, filed an answer to the petition, denying any lien on the boat for any portion of the account prior to May 8, 1865; and averring that a portion of the account after the 8th of May had been paid, leaving only about \$400 or \$500 of the account due; and that Gray, Springer & Dozier purchased the boat long after the dates of any of the items in the account, and that they were not the owners at the time any of the supplies were furnished.

Upon the trial, the court (sitting as a jury) found for the plaintiffs the sum of \$4,414.49.

Capt. T. P. Perkins, who was half owner of the boat during the whole period covered by the account, and was managing owner and financial agent of the boat, gave his two due bills for the cash "advanced" to the boat, one for \$500, the other for \$1,500; and stated in his testimony that the money was borrowed to pay off the crew of the boat for wages already due, and to purchase supplies.

It appeared from the testimony that the boat left St. Louis in the fall of 1864, and was engaged in the southern trade until the spring of 1865, and did not visit the port of St. Louis during the interval, about five months. It further appeared that a separate account of the items furnished for each trip of the boat was made out and presented for payment at the end of each trip. The two due bills referred to were read in evidence as follows:

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"\$500. Due Boylan & Gettys five hundred dollars, cash borrowed for acc't steamer Victory. St. Louis, August 20, 1864.—T. P. Perkins, owner."

"\$1,500. Due Boylan & Gettys fifteen hundred dollars, cash borrowed on acc't steamer Victory. St. Louis, November 12, 1864.—T. P. Perkins, owner."

Plaintiffs offered in evidence the following paper, to-wit:

"The money advanced by Boylan & Gettys on the 26th of August, 1864, five hundred dollars, and on the 12th of November, 1864, fifteen hundred dollars, to the steamboat Victory, at St. Louis, was advanced by them and received by the boat for the express purpose of purchasing stores and supplies, fuel, and paying the necessary accruing expenses of the immediate trips after said advancements and said money were so appropriated.—T. P. Perkins."

It appeared from the testimony that it was executed after Perkins had sold the boat; he did not know the purport of the note when he signed it, but was told by one of the plaintiffs that it was paper putting both due bills into one.

Defendant objected to the introduction of the paper as incompetent evidence to show any lien on the boat. The court overruled the objection and admitted the paper in evidence, to which defendant excepted.

Upon the trial, the defendant asked the court to give the following instructions, which were given:

1. If the money was loaned to T. P. Perkins, then it devolves on plaintiffs to prove to the satisfaction of the court that it was loaned for the purpose of purchasing or procuring supplies, or labor to be done or furnished for the boat.

2. If the money was loaned for the purpose of paying wages due to the crew of said boat, or any other debt or liability of said boat or its owners, then there is no lien on the boat therefor, and the onus is upon plaintiffs to prove to the satisfaction of the court the facts necessary to create a lien on the boat for said money.

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Defendant also asked the following instructions, which were refused :

3. If the court finds from the evidence that the boat left St. Louis on or about the 24th day of November, 1864, and from that time until May, 1865, there were no purchases for said boat, and no dealings or transactions between plaintiffs and said boat, or any one on its behalf, then, unless there was a contract or understanding that there should be other dealings or transactions with plaintiffs for said boat, or the account was not kept open by request on its behalf, there is no lien for any of the items in the account of date of said 24th of November, 1864, or prior thereto.

4. The items in the plaintiffs' account which accrued on and before the 24th day of November, 1864, are no lien on the boat, unless at the time the items were furnished on said 24th of November, it was agreed or understood between the parties that the plaintiffs should subsequently furnish supplies to defendant, and that the account was agreed to be kept open for the purpose of adding such subsequent purchases to it.

The court then, of its own motion, gave the following instruction :

"If there were no dealings or transactions between plaintiffs and the boat, or any one on its behalf, from the 24th day of November, 1864, until in May, 1865, and there was no contract or understanding or expectation that there would be any other such dealings or transactions, then there is no lien on the boat for any of the items in the account of 24th of November, 1865, or prior thereto."

The giving of which was excepted to by defendant.

*Sharp & Broadhead*, for appellant.

The true rule is held to be, that where there are mutual charges and transactions, reciprocal demands between the parties, so that it is uncertain on which side the balance will fall, as it is constantly fluctuating, then each item of the other party is an admission, an implied agreement for the



continuance of the account; it is this agreement implied which constitutes mutual accounts, in which the last item in the mutual current form draws with it the prior current items and prevents the statute running against them. If, however, the account is wholly on one side, charges of one only against the other, this doctrine does not and cannot apply, and only such bills can be enforced as are in point of time within the period limited.—Ang. on Lim. 130-5, 139, § 8; Kimball et als. v. Brown, 7 Wend. 322, and cases cited; 5 Johns. Ch. 524.

II. That the subject matter of this suit, the furnishing of supplies to a vessel, is a maritime contract, and a cause of general admiralty jurisdiction, there can be no question, and as such it is within the peculiar jurisdiction of an admiralty court; ("Gen. Smith," 14 Wheat. 443; De Lovio v. Boit, 2 Gal. 398-406; 2 Pars. Mar. Law, 511;) and to enforce a right under such a contract the party could always proceed in an admiralty court either *in rem* or *in personam*—"Orleans," 11 Pet. 184.

If the supplies were furnished at the home port, neither in England nor in this country (except in certain cases) could the proceeding be *in rem*, but *in personam* only; but the contract was nevertheless a maritime contract. But could the State courts here, or the courts of common law in England proceed *in rem*? The admiralty proceeding *in rem* is peculiar to admiralty courts.

The proceeding under the boat law is a proceeding *in rem*, in a case clearly of admiralty jurisdiction. "The proceedings *in rem* against the ship itself is the proper and peculiar province of the Court of Admiralty. The jurisdiction of the courts of common law is expressed by suits against the person"—Abb. Ship. 162-3; Ben. Ad. § 362. This proceeding *in rem* is a proceeding against the property, and everybody interested in the property may become a party to the proceeding—Ib. § 364. No such proceeding is known at common law.

If the State courts can resort to an admiralty proceeding



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in a maritime case, then the State courts can oust the jurisdiction of the Federal courts in all cases of admiralty jurisdiction, which, by the Constitution and acts of Congress, are within the peculiar and exclusive jurisdiction of the Federal judiciary.

As to what is a common law remedy under the act of 1789, Judge Wells, in the case of *Ashbrook et als. v. Golden Gate*, says: "In my judgment, it can be only common law actions—actions of debt, assumpsit, case of trespass, trover, &c., as practised at common law; such are the only common law remedies then, or indeed now known. A proceeding *in rem* is unknown as a common law remedy"—Newb. Ad. 305.

*Rankin & Hayden*, for respondent.

In the present case, the admiralty had no jurisdiction. The boat was a home boat, and Perkins, the owner, as he himself testifies, had ample credit; he testifies particularly to his credit and ability to pay. Now, it has been settled by a long line of decisions, not only of the District and Circuit courts, but of the United States Supreme Court, that there is no right to proceed in admiralty where the supplies or materials are furnished in the home port of the vessel—Abb. on Ship. 142-4, and Am. notes; 1 Pars. on Mar. Law, 489-90. By the decisions it is indispensable, in order to give admiralty jurisdiction in a case of supplies or materials furnished to a boat, that, 1. The boat should be a boat foreign to the port where the supplies are furnished; 2. That these supplies were necessarily furnished on the credit of the boat—the master, owner, agent, &c., having no credit and no ability to procure money and supplies except on the credit of the vessel.

In order to prove a maritime lien and give the admiralty jurisdiction, the plaintiff must show, 1. That supplies were furnished to a foreign vessel; 2. That there was no personal credit given, no owner that could be resorted to, no party whatever on the boat's part with funds or means that could

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be resorted to—Ship Potomac, 2 Black, 581; Str. St. Lawrence, 1 Black, 522; Maguire v. Card, 21 How. 248; Todd v. St. Bt. Sultana, 19 How. 362; Pratt et al. v. Reed, 19 How. 359.

Now it cannot be claimed that in the "Adam Hines" case the Supreme Court decides anything more than that where a cause of action exists in the Admiralty courts of the United States and the party has a remedy there, there is no concurrent remedy against the boat in the State courts, and the boat laws, so far as they afford a concurrent remedy, are unconstitutional. And it should be observed that the Supreme Court has always, in respect to jurisdiction, distinguished cases of maritime torts from cases of contract, placing the jurisdiction in cases of tort on grounds peculiar to themselves.—Warring v. Clark, 5 How. 452; Genesee Chieftain, 12 How. 443; Magnolia, 20 How. 289; P. & W. R.R. Co. v. Phil. & Hav. Towboat Co., 23 How. 215; Propeller Commerce, 1 Black, 574.

It has been decided that by the law of the United States, in admiralty, the builder's contract "is not a maritime contract;" that "though in countries governed by the civil law, courts of admiralty may have taken jurisdiction of such contracts, yet in this country they are "purely local and governed by State laws, and should be enforced by their own tribunals"—Morewood v. Enequist, 23 How. 491; People's Ferry Co. v. Brown, 20 How. 401.

HOLMES, Judge, delivered the opinion of the court.

The suit is founded upon an account for items of stores and supplies, and of money furnished to purchase stores and supplies, upon a special request for that specific purpose; and the account ran from the 20th of August, 1864, to the 8th day of May, 1865, with an interval of less than six months between November, 1864, and May, 1865, the boat being absent during the winter. There was evidence tending to show that all the items of the account were for stores and supplies, and were a lien upon the boat under the stat-

ute, and that it was one continuous running account in a regular course of dealing between the parties; and it further appeared that when the bills were presented for payment, in the fall of 1864, the owner or agent requested further indulgence, and the account was continued and the course of dealing renewed in the spring, when the boat again commenced running from this port.

It has been argued that this was not a mutual open account. The statute requires only that the suit shall be commenced within six months "after the true date of the last item in the account upon which the action is founded." The action is based upon the statute, which does not require a mutual account, but supposes that the items may be all on one side of the account. The limitation is to be reckoned from the date of the last item, and it matters not that some of the earlier items may bear date before that time; but it is supposed that there is but one account and one demand, and not several separate and distinct demands—*Carson v. St. Bt. Hillman*, 16 Mo. 256. Where it is specially agreed or impliedly understood between the parties that the account is to be kept open and continued as one, and the same continuous transaction and course of dealing, the account will be considered as one continuous account and one demand—*Madison Co. Coal Co. v. St. Bt. Colona*, 36 Mo. 446. There was evidence before the court from which it might reasonably be inferred that such had been the understanding of the parties and the real nature of the transaction in this case, and the verdict will not be disturbed on this ground.

As to the admission of the paper signed by the captain and owner, to which exception was taken, it is unnecessary to say more than that the testimony was conflicting as to the time when it was signed, and that there was ample evidence, otherwise, to establish the account and the lien. If it were signed while the party was still an owner, it was certainly admissible—*Phillips v. St. Bt. Eureka*, 14 Mo. 532.

If it had been signed after he ceased to be an owner, or after the boat had been seized and ordered to be sold, it

would not be admissible—*Renshaw v. St. Bt. Pawnee*, 19 Mo. 532. But the demand was fully proved by the testimony and by the due bills which were given for the moneys advanced, and the judgment would not be reversed for the reason that this paper was admitted in evidence, even if there were room for doubt as to its admissibility.

On the question of jurisdiction, the case comes within the decision in the case of *Cavender et al. v. St. Bt. Fanny Barker*, decided at this term. The demand consists of stores and supplies furnished to the boat at the instance of the captain and owner, while lying in this port. It appeared that the boat belonged to this port and that the owners were resident here. The contract was made within the body of the county; and the parties and the boat itself were within the territorial jurisdiction of this State. This was a land contract, though relating to a vessel, and not a maritime contract within the exclusive jurisdiction of the admiralty; unless it were to be held that all contracts relating to a boat or vessel must necessarily be maritime—2 Pars. on Mar. Law, 512. Marine contracts, of which the admiralty has cognizance, have been defined to be “contracts made on the sea, whose consideration is maritime, and not ratified by deed nor under seal.” And it has been laid down by high authority that “no person can sue in the admiralty for work and labor done in port before the voyage begins, or for necessities sold for the ship’s use before she sails”—2 Brown’s Civ. & Adm. Law, 72–80; *Ross v. Walker*, 2 Wils. 264; *Wilkinson v. Barnardiston*, 2 P. Will. 367. “Admiralty causes,” says Blackstone, “are those arising wholly upon the sea, and not within the precincts of any county”—3 Black. Com. 106. It may be otherwise in a case of a boat or vessel needing repairs or supplies in a foreign port, where the owners do not reside, or are absent, where the contract must operate solely *in rem*, and where a lien is given in the admiralty—3 Kent’s Com. (7th ed.) 214, 218. In such case the jurisdiction *in rem* may be exclusive in the admiralty, but here the contract is not maritime, and the jurisdiction *in rem* is given by the

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statute against this vessel in her home port, where the owners are resident, and upon contracts made and to be performed within the body of the county, where no lien exists in the admiralty (3 Kent 214, 218), and the whole matter arises within the territorial jurisdiction of this State. It is held by the courts of common law that the admiralty jurisdiction is confined to contracts made upon the high sea, to be executed upon the high sea, of matters in their own nature maritime—*De Lovio v. Boit*, 2 Gall. 437. In this case Mr. Justice Story includes among "maritime contracts," coming within the recognizance of "all civil causes of admiralty and maritime jurisdiction," contracts for "maritime services in the building, repairing, supplying and navigating ships," and "policies of insurance," which (he admits) are not *exclusively* within the admiralty and maritime jurisdiction of the United States—Ibid. p. 475-6. We conclude that this contract for stores and supplies was not within the *exclusive* jurisdiction of the admiralty—1 Conkl. U. S. Adm. 14-15; 1 Kent's Com. (7th ed.) 404-407; the *Santiago de Cuba*, 9 Wheat. 409; *Ramsey v. Allegre*, 12 Wheat. 611.

According to the views above expressed, the court committed no error in the giving or refusing instructions. The evidence sustained the verdict, and the judgment will be affirmed. The other judges concur.



MICHAEL F. GIBBONS AND SIDNEY C. EPPERSON, Appellants, v.  
STEAMBOAT FANNY BARKER, Respondent.

1. *Boats and Vessels—Stevedores—Liens—Work and Services.*—Work and labor done, or services rendered, in unloading a boat or vessel in port, by persons not regularly employed on the vessel, do not create a lien upon the boat under our statute.
2. *Boats and Vessels—Liens—Stores and Supplies.*—Moneys advanced to a boat to pay her debts or expenses generally do not constitute a lien under our statute; it must be shown that the moneys were specifically advanced for the purposes for which a lien is given.

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3. *Boats and Vessels—Practice—Amendments—Limitations.*—In a suit against a boat or vessel, the plaintiff cannot so amend his petition as to introduce a new cause of action; especially after the time of commencing suit upon the lien has expired. The statute relating to boats and vessels being in derogation of the common law, must be strictly construed.

*Appeal from St. Louis Circuit Court.*

*J. K. Knight and Francis Garvey*, for appellants.

*Rankin & Hayden*, for respondent.

HOLMES, Judge, delivered the opinion of the court.

The amended petition claimed a lien on the boat, under the first section of the act concerning Boats and Vessels, "on account of debts contracted by the master and owner thereof for stores and supplies" for the use of the boat, and "on account of labor done on said boat in getting out, furnishing and equipping thereof." Among the items given there was a sum of \$900 "for money advanced to enable her to prosecute her voyages," and the rest were for loading and discharging freight. In the first petition, the item for money advanced was stated to be a sum of \$400 "for money advanced to pay the crew." The amended petition was filed more than six months after this part of the demand as therein stated had occurred, the amount being raised to \$900, as the plaintiffs claim. On this item, the court allowed the sum of \$400 only, and rejected the items for loading and discharging freight.

The items for loading and discharging freight on the boat were properly rejected. They were neither alleged nor claimed to be for work or services done by hands or other persons employed on board of the boat, within the first clause of the section giving liens; and they did not come within the meaning of the second clause. It is contended that they may be considered as labor done in "getting out" the boat. This could be an entire misconception of the intent and scope of the act, as well as of the decision in the case of the Madison County Coal Co. v. St. Bt.



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Colona, 26 Mo. 446, which has been referred to. The services claimed to be a lien in that case were for towing a boat from the place where she had been laid for a time to the city wharf, preparatory to the commencing of the regular voyages. This was the ground of the lien. The services here appear to have been rendered under some special hiring by a person not regularly employed on board of the boat, while the boat was lying in port. The statute gives no lien in such case.

The item of \$900 is charged for money advanced to "enable the boat to prosecute her voyages." The only ground of lien that is alleged in the petition, under which this item can fall, is that of a debt contracted for stores and supplies. The evidence concerning it did not show that the money had been advanced for this specific purpose, but merely that it was loaned, generally, to enable the boat to proceed on her voyage, and that it was paid to the clerk and used to pay the running expenses of the boat. This was not enough to bring the demand within the lien for stores and supplies. The word "supplies" cannot be interpreted to mean supplies of money for all the purposes for which money may be required in the navigation of the vessel. In its ordinary acceptation, it is understood to mean those articles which a boat may find it necessary to purchase for consumption and use on the voyage. It is something different from wages for which a lien is specially given also. Money loaned for the specific purpose of enabling a boat to purchase such supplies, or to pay wages, or debts incurred already, or to be incurred in future, for things which are liens, have been held to be a debt contracted for those things, and therefore a lien also on the boat. *Bryan et al. v. St. Bt. Pride of the West*, 12 Mo. 371; *St. Bt. Brady v. Buckley*, 6 Mo. 558; *Phelps v. St. Bt. Eureka*, 14 Mo. 532.

But money loaned to enable the boat to pay her debts, or expenses, generally, which may be as well for things which are not liens as for those which are, will not be a lien under the statute. Such debts must be considered as incurred on the credit of the owners. *Bailey v. St. Bt. Concordia*, 17



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Mo. 357; Hays v. St. Bt. Columbus, 23 Mo. 232. Money advanced to enable the boat "to prosecute her voyages," and only shown to have been for expenses generally, must fall under this category. We think the plaintiffs wholly failed to establish a lien against the defendant.

On what ground the court allowed this item of \$400 is not apparent from anything contained in the record. The case was not to be tried upon the original petition; and we find nothing in the evidence to warrant that allowance under the amended petition. We are inclined to think it should have been considered a separate and distinct demand, different from that claimed in the original petition. The only ground of lien stated in the original petition was for a demand for labor done and materials furnished, and among the items there was one for "money advanced to pay off the crew, \$400." In the amended petition there was a demand of \$900 for money advanced "to enable the boat to prosecute her voyages," and a lien is claimed as for stores and supplies. It is a new and wholly different demand. The statute requires that the demand sued for shall be set forth in all its particulars. The cause of action occurred on this demand when the money was advanced. Darby, Ad'r, v. St. Bt. Inda, 9 Mo. 653. At the time when this demand was introduced into the petition, the six months had elapsed and the lien was gone. It was held in the case of Camden v. St. Bt. Georgia, 6 Mo. 381, that a complaint against a boat might be amended like a common declaration, in respect of particulars which did not substantially change the nature of the demand itself; but one of the judges was of the opinion that no amendment at all could be made. It is a statutory proceeding in derogation of common law, and should be construed strictly. It would be going very far to say that a party, by amending his petition, might revive a lien which was already lost by force of the statute itself. We are of the opinion that this was more properly a new suit than an amendment, and that there was, for this reason also, no subsisting lien on the boat.

The judgment will be reversed. The other judges concur.

Gibbons et al. v. St. Bt. C. J. Caffrey.—Aiken et al. v. St. Bt. Fanny Barker.

MICHAEL F. GIBBONS AND SIDNEY C. EPPERSON, Appellants, v.  
STEAMBOAT C. J. CAFFREY, Respondent.

*Boats and Vessels.*—See Gibbons et al. v. St. Bt. Fanny Barker, *ante* p. 253.

*Appeal from St. Louis Circuit Court.*

*J. K. Knight*, for appellants.

*Rankin & Hayden*, for respondent.

HOLMES, Judge, delivered the opinion of the court.

The claim in this case was for a lien on the boat for labor done by a person not employed on board of the boat, in loading and discharging freight, as for a debt contracted (as alleged) in getting out, furnishing and equipping the boat, under the second clause of the act concerning Boats and Vessels. The case comes within the decision in Gibbons v. St. Bt. Fanny Barker, decided at this term. The statute gives no lien in such a case.

Judgment affirmed. The other judges concur.



AIKEN & Co., Appellants, v. STEAMBOAT FANNY BARKER, Respondent.

*Boats and Vessels—Waiver of Lien—Note—Practice.*—A party having a lien upon a boat and taking a note for the amount thereof, may prosecute a suit against the boat in his own name to the use of his assignee, if he have the note ready at the trial to be delivered up and cancelled.

*Appeal from St. Louis Circuit Court.*

*Woerner & Kehr*, for appellants.

The claim was properly presented in the name of Aiken & Co. Neither the account itself nor the lien growing out

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of it was ever attempted to be transferred, but the note, which is merely the evidence of the existing debt, and which the boat and vessel act (§ 52, p. 759) permits the lien holder to take without affecting his right of lien, was transferred to a third person by delivery, who, as the evidence tended to prove, took it on the faith of the *lien*. Plaintiffs produced the note in court to be cancelled, which is not only *prima facie* evidence of their ownership of the note, but as against the boat is conclusive, for it matters not whether the plaintiffs bought the note back after its transfer, or whether it was donated or otherwise voluntarily and gratuitously surrendered to them; for no one will question the right of the transferee to make what disposition he pleases of his title to the paper. The title to the note, then, was back in the plaintiffs, and the court will not inquire what consideration they paid for it, or whether they have made a contract touching the ultimate disposition of the proceeds to be recovered in this proceeding—Page & Bacon v. Lathrop, 20 Mo. 589. This lien was not extinguished by the mere fact of the transfer of the note.

“Gen. Jackson,” Sprague’s Dec. p. 554, it is held in reference to a maritime lien, that “an assignment of his claim by the creditor is not a waiver of lien”—St. Bt. Charlotte v. Kingsland, 9 Mo. 66. The right to a mechanic’s lien may be transferred without prejudice to the lien—Goff v. Papin, 34 Mo. 177. The question of the assignability of a mechanic’s lien was directly before the court.

*Rankin & Hayden*, for respondent.

I. The statute gives a right only to creditors “having a lien”—G. S. p. 756, § 21. The evidence shows that when the claim was filed the plaintiffs had no lien; they had sold it.

II. The action was not prosecuted in the name of the real party in interest, nor did the claimants show themselves to be within the exceptions—G. S. 651, § 2 & 3.

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III. The assignment and sale of the lien destroys its existence as a lien demand. The lien was a personal privilege, incapable of being transferred to a third person and thence enforced as a lien. It is only given to the party who does the labor or furnishes the supplies—*Pearsons v. Tucker*, 36 Me. 384; *Roberts v. Fowler*, 3 E. D. Smith, 632. The analogy of the admiralty law holds, by which liens are personal and peculiar—*Newbury's Adm'rs*, 432, 449; 8 Pick. 73, 76; 1 Md. Ch. D. 220; 10 Hump. 371.

IV. The taking of a negotiable promissory note in settlement of the demand, and passing it away and getting the money for it, waived or destroyed the lien—*St. Bt. Charlotte v. Lumm*, 9 Mo. 63; *Ramsey v. Allegre*, 12 Wheat. 611; 29 Vt. 165; *Harris v. Schr. Kensington*, 8 Am. Law Reg. 144, 155; 2 Wallace, Jr. 327.

HOLMES, Judge, delivered the opinion of the court.

This is an appeal from the judgment of the St. Louis Circuit Court refusing to allow the claim of the plaintiffs against the defendant, under the 22d section of the act concerning Boats and Vessels. It was not denied that the demand was originally a lien on the boat; but it appeared in evidence that the note which had been given to the plaintiffs by the owner of the boat for stores and supplies, had been sold and delivered by them to another person, without endorsement, and that it had been subsequently handed back to the plaintiffs, who presented the same for allowance in their own names to the use of the purchaser; and it was proved that the proceeds when collected were to go to him. The grounds of objection were that the lien was lost by the transfer of the note, and that the plaintiffs had no interest in the demand.

The legal title to the instrument had not been transferred. It amounted to an equitable assignment only. The legal title and the possession were in the plaintiffs when the demand was presented. The note was produced and offered to be given up when allowed. We see no objection to an al-

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lowance of this demand in favor of the plaintiffs. It makes no difference that they could hold the money when collected for the use of the other party as the equitable owner. This would seem to be in entire accordance with the tenor of the decisions in this State, upon the right of the party having the legal title to the note to sue upon it in his own name, though the proceeds might belong to another in equity, and the case comes within the decision in the case of the *St. Bt. Charlotte v. Kingsland*, 9 Mo. 66. This conclusion is not inconsistent with the cases of maritime lien, in which the same doctrine is applied in similar cases—*Sutton v. Albatross*, 2 Wallace, Jr. 327; *Sprague's Dec.* 554; *Harris v. Schr. Kensington*, 8 Amer. Law Reg. 144; *Boylan v. St. Bt. Victory*, *ante* p. 274, and *Morrison v. St. Bt. Laura*, *post* p. 260.

We think the demand should have been allowed.

Judgment reversed and the cause remanded. The other judges concur.



THOMAS MORRISON AND THOMAS F. McENNIS, Appellants, v.  
THE STEAMBOAT LAURA, Respondent.

1. *Boats and Vessels—Waiver of Lien—Note—Practice.*—The taking of a promissory note does not waive the lien given by the statute upon a boat or vessel, although the note may have been discounted in bank, if the note be delivered up at the trial to be cancelled. See *Aiken et al. v. St. Bt. Fanny Barker*, *ante* p. 257.
2. *Boats and Vessels—Agency.*—The agent can bind the boat by his contracts in behalf of the owner.

*Appeal from St. Louis Circuit Court.*

George P. Strong, for appellants.

The points made against plaintiffs' claims are understood to be mainly these: 1. They took a note for about \$3,000.19, signed by Nolan & Caffrey, for part of their account; 2. They took the company's note for \$1,872.74 for another part;

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and 3. They endorsed and discounted these notes in the Second National Bank.

It is well settled that the taking of a negotiable note or bill of exchange of the owner, master or assignee does not destroy the lien, if the note, &c., matures within the time of the existence of the lien—*Harris v. Kensington*, 8 Amer. Law Reg. 184; 24 J. R. 404; 2 Browne, 297; 9 Mo. 58, 63; R. C. 1855, p. 316, § 50; 9 Mo. 59; id. 67; *Olcott*, 286; *Goff v. Papin*, 34 Mo. 177; *Grant v. Mills*, 2 Ves. & B. 309; 22 Mo. 139; *Flanders' Mar. Law*, p. 191, § 247; 30 Mo. 458.

*Rankin & Hayden*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The same question of jurisdiction arises in this case that was brought up in the case of *Cavender & Rowse v. St. Bt. Fanny Barker*, and will be ruled in the same way. It is unnecessary to notice with particularity the point urged by respondent's counsel, that Scott was not such an agent within the meaning of the "Act concerning boats and vessels" as could bind the boat. The statute gives the lien for supplies and stores furnished by contract with the master, owner, agent or consignee. Scott was the agent of the owner, and the owner contracting by the agent, contracts by himself.

The account was closed, and the plaintiffs received the negotiable notes of the defendant for the amount and discounted them in bank, which notes being protested for non-payment were taken up by plaintiffs. The notes matured within six months of the time when the supplies were furnished. It is contended that the taking of the negotiable notes and discounting them amounted to waiver of the lien, and of this opinion it seems was the court below. Sec. 50 of the statute says: "The taking or receiving of a note, bill of exchange, or other writing, in a settlement of a debt comprehended in the second class enumerated, shall in nowise

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invalidate the lien given by this act, but the same shall exist in full force, as if no such note, bill of exchange, or other writing, had been given."

Neither a note, nor a receipt in full, without a special agreement, will extinguish an original demand. Here no special agreement was shown. It was held in the case of the *St. Bt. Charlotte v. Hammond*, 9 Mo. 58, that a note given and payable at a future day, but within the duration of the lien, will not merge the original debt, nor extinguish the lien. Judge Story says the accepting of a negotiable promissory note is not a waiver of the lien if it is not deemed an absolute payment of the debt at the place where the contract is made, and if the creditor at the hearing offers to surrender it, the lien still exists—*Bark Chusan*, 2 Sto. 470. In the case under consideration, the plaintiffs had the notes at the hearing, and offered to surrender or cancel them. According to the well settled principles of law, the lien was neither waived nor destroyed. The statute is so explicit that it is needless to invoke any other authority. The taking or receiving a note, bill of exchange, or other writing, shall not invalidate the lien. No instrument of writing, therefore, will render the lien invalid unless a special agreement is made that it is received in full satisfaction of the debt. Is negotiating the instrument to be regarded as a forfeiture of lien? If so, why does the statute include a bill of exchange? It was surely never intended that the party receiving it should be compelled to keep it and not put it in circulation. When plaintiffs received the negotiable promissory notes, in accordance with usage they had a right to discount them; when they took them up after protest, they had lost none of their rights and were fully entitled to their lien.

The judgment must be reversed and the cause remanded. The other judges concur.



PETER CONNELLY, Respondent, v. THE STEAMBOAT BEE, Appellant.

*Courts — Jurisdiction — Boats and Vessels — Admiralty.* — Where the cause of action by a mariner for wages, for services rendered on the boat, accrues beyond the territorial jurisdiction of this State, the contract is within the exclusive jurisdiction of the admiralty, and the mariner cannot maintain an action against the boat in our courts.

*Appeal from St. Louis Circuit Court.*

*Lackland and Martin*, for respondent.

I. The desertion of the boat during the voyage by the defendant, without just cause, created a forfeiture of all wages antecedently due him ; and the defendant's first instruction, which was fitted to the facts, should have been given—3 Kent, 197.

II. The instruction given by the court at plaintiff's instance was erroneous. It applied the rule of forfeiture only to wages earned after leaving the last port. This a most unreasonable construction of the law and is virtually a rescission of the principle of the forfeiture of wages by a seaman for desertion of his ship without cause in a time of peril and danger, when applied to the navigation of our inland seas or lakes and navigable rivers.

By the well settled principles of maritime law, where seamen, employed for a voyage or by the month, voluntarily leave the vessel before the termination of the voyage, or the expiration of the time for which they were hired, without good cause, or the consent of the master, they will thereby forfeit the wages previously earned—*The Swallow*, Olcott Adm. 4 ; *The Hudson*, Olcott Adm. 396 ; *Cloutman v. Denison*, 1 Sumner, 373 ; 3 Kent Com. 198.

*Jecko & Clover*, for appellant.

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Hogan et al. v. St. Bt. Minnie.

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HOLMES, Judge, delivered the opinion of the court.

This was a suit for wages under the statute concerning Boats and Vessels. It appears from the evidence that the boat belonged to the port of Pittsburg, and was employed in making voyages from that port to Cairo, New Orleans and St. Louis; that the plaintiff was hired as a deck hand at Cairo, and that on a second voyage from that place to Louisville, after a service of about ten days, he voluntarily, and without any good cause, quit the boat in the midst of her trip, at some distance below Louisville. He now sues the boat in the port of St. Louis for his wages during the time he served.

The boat was a vessel belonging to another port. The contract was made and the cause of action arose on the river beyond the territorial jurisdiction of this State. It is a maritime contract within the exclusive jurisdiction of the Admiralty—2 Pars. on Mar. Law, 509; 3 Black. Com. 106; 2 Brown's Civ. & Adm. Law, 72-80; St. Bt. Swallow, Olcott, 4; Curtis on Merchant Seamen, 345-50. We think it is very clear that this proceeding *in rem* against the boat in this port under the statute, in a case of this kind, falls within the decision of the Supreme Court of the United States in the case of the St. Bt. Ad. Hine v. Trevor (Dec. T. 1866), and cannot be sustained—De Lovio v. Boit, 2 Gall. 453; Ramsey v. Allegre, 12 Wheat. 611.

Judgment reversed and the petition dismissed. The other judges concur.



PATRICK HOGAN AND EDWARD HOGAN, Respondents, v. STEAM-BOAT MINNIE, Appellant.

*Boats and Vessels—Courts—Jurisdiction—Admiralty.*—A contract for work and labor done and materials furnished in repairing a vessel at her home port, is not a maritime contract, and may be enforced against the boat under the statutes of this State.

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Hogan et al. v. St. Bt. Minnie.

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*Appeal from St. Louis Circuit Court.*

*John W. Noble*, for respondents.

*Clark, Coonley, and Knight*, for appellant.

HOLMES, Judge, delivered the opinion of the court.

This was a suit against the boat under the statute for work and labor done and materials furnished in making repairs on the boat in the home port, under contract with the resident owners and within the territorial jurisdiction of the State.

We think this was a land contract though relating to a vessel, and not a maritime contract within the exclusive jurisdiction of the admiralty. Every contract that relates to a boat is not necessarily maritime—2 Pars. on Mar. Law, 512. It does not therefore come within the decision in the case of the *Ad. Hine v. Trevor*, (Sup. Court of the U. S., Dec. T. 1866). The decision in *Boylan v. St. Bt. Victory* (decided at this term), on this point, covers this case.

It was insisted for the defendant that there was a balance of account due the owners of the boat on some transactions between the parties of previous date to the repairs which were the subject of the suit and lien in this case, and it was claimed that such balance should have been applied as a payment on this demand. There was no plea of set-off or counter-claim, and no proof of any agreement for an application of this supposed balance as a payment on the demand sued for. We do not see that the rule as to the application of payments had any thing to do with the case. The evidence appears to have fully sustained the plaintiffs' petition, and we have found no such error in the instructions as will justify a reversal of the judgment.

Judgment affirmed. The other judges concur.

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Brant's Will.

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HENRY B. BRANT, Plaintiff in Error, v. SARAH B. BRANT, EXECUTRIX, AND LAWRASON LEVERING, EXEC'R OF JOSHUA B. BRANT, DEC'D, Defendants in Error.

1. *Wills—Legatees and Devisees—Marshalling Assets.*—The testator by his will directed his executors to pay off and discharge all his debts out of his estate as soon as could conveniently be done after his decease; he then bequeathed and devised his estate by specific legacies and devises to his wife and his children in nearly equal parts. The executors, from the rents of the realty, paid off the debts. Upon a bill to marshal assets, *held*, that as the testator had designated no specific fund from which the debts were to be paid, it was his intention that the devisees and legatees should contribute ratably to the abatement of the encumbrance, and that the whole burden of the debts could not be thrown upon the personal estate.
2. *Wills—Dower—Devise—Election.*—A widow may always refuse to take under a will as a devisee or legatee, and may fall back on her claim for statutory dower, but she cannot claim under the will and under the statute at the same time; she must make her election, and claim under the one and reject the other. The widow does not take under the will as a purchaser, so as to have the portion bequeathed and devised to her discharged from liability for payment of the debts of the testator, when the burden of the debts is imposed generally upon the whole of the estate.

*Error to St. Louis Court of Common Pleas.*

*Napton* with *T. T. Gantt*, for plaintiff in error.

I. The rule in England and Missouri is, that the personal estate while in the hands of the executor is the primary and natural fund which must be resorted to in the first instance for the payment of debts of every description contracted by the testator—*Wms. on Ex'rs*, 1149; *Stokes v. O'Fallon*, 2 Mo. 29.

Even in case of contingent liabilities, the executor is not justified in giving up the residue without bond from specific legatees to refund—*Wms. on Ex'rs*, 546, B 2, and especially note Q for American references; *R. C.* 1855, Administration, p. 3, ch. 125, § 9; *id.* ch. 121, § 19, pp. 48-9; *id.* ch. 22, §§ 10, 47.

II. In order to exempt any of the personal estate from its primary liability for debts, there must appear from the whole will taken together an intention so expressed as to convince

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a judicial mind, not merely to charge the real estate, but so to charge it as to exempt the personal—Booth v. Blundell, 1 Meriv. 193; Wms. on Ex'rs, 1450.

III. In the absence of any indication of intention in the will as to the fund from which his debts were to be paid, we insist that, 1st, the residuum of personalty must be exhausted; 2d, that the general pecuniary legacies must be exhausted; 3d, that the specific legacies must be exhausted (or, in any view, that they must contribute with the specific devisees ratably); and lastly, the devisees of land.

The rule was well settled in England up to 1844, that specific legacies had to be used for payment of debts in preference to devises of land which are also specific. Such was the fifth resolution laid down by Ld. Talbot in *Barlewood v. Pope*, 3 P. Wms. 322, and such was the express decision of Vice Ch. Shadwell in *Cornwall v. Cornwall*, 12 Sim. 298, of Ch. Kent in *McKay v. Green*, 3 Johns. Ch. 56, and *Livingston v. Newkirk*, 3 id. 312, and of Ch. Walworth in *Rogers v. Rogers*, 1 Pai. 188, and of all the courts of Error in the same case reported in 3 Wend. 503. Such was manifestly the opinion of Judge Story when he wrote his treatise on equity and discussed the doctrine of marshalling assets—1 Sto. Eq. §§ 565, 571, 573; Will. on Exec'rs, 382. And such seems to be the rule inferable from our statute—Administration Law, § 21, p. 509. On the other hand, Vice Ch. Sir K. Bruce in *Tombs v. Roch*, 2 Coll. 490, and another Vice Ch. (Shadwell), in *Gervis v. Gervis*, 14 Sim. 654, establish the rule that the specific legatees and devisees must contribute ratably—professing to follow *Long v. Short*, 1 P. Wms., and an *obiter dictum* of W. Sugden in *Young v. Hazzard*, 1 Jones & L. 465; though both of these cases were of devises or bequests of freehold and leasehold expressly subject to the payment of debts. See Jarm. on Wills, 547–8, note *b.*, where the law is stated to be as laid down in *Clifton v. Burst*, 1 P. Wms. 679, and in Ld. Talbot's 5th resolution, and the case of *Long v. Short* is said to be against all the old decisions.

IV. After all, the intent of the testator is the controlling

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consideration in the interpretation of a will ; and it is insisted, that as the testator left the mass of his personal estate (nearly all) to his wife, and made her executrix, and as such directed her to pay his debts, his intent was (knowing as he did, or is presumed to know, that the personal estate was the natural and primary fund for the payment of debts) that they should be paid out of the personalty ; and in the absence of any intent one way or the other, the above rules in point 3 prevail.

V. The claim of the widow to hold all the personalty and all the realty left her in the will, as a purchaser entirely exempt from the payment of debts, is unfounded. 1. It is against the manifest intent of the testator ; 2. It contravenes the well established doctrine that one cannot claim under and against a will. The statute presents three or four choices to a widow, and the will affords another. She has ample time for deliberate and intelligent selection. If she takes the will and rejects the statutory offers, she occupies the position of any other legatee or devisee, and must abide by its general intent—*Tipping v. Tipping*, 1 P. Wms. 729 ; *O'Neal v. Meade*, id. 603 ; *Clifton v. Bunt*, id. 670 ; Wms. on Ex'rs, 647-8, and note ; *Tynt v. Tynt*, 2 P. Wms. 544, and especially Mr. Coxe's note ; *Burridge v. Budget*, 1 P. Wms. 127 ; *Williamson v. Williamson*, 6 Pai. 298 ; *Swilson v. Corbett*, 3 Atk. 369 ; *Ridout v. Plymouth*, 2 Atk. 105 ; see especially *Pemberton v. Pemberton*, 29 Mo. 412.

VI. The third position assumed by the executors in their answer, that the residuum general legacies, specific legacies, and specific devises, are all to contribute ratably to the payment of the debts, seems to be without any authority or any principle to support it.

VII. The second position assumed in the answer is, that the devised lands to the widow must be exempt from debts, but that the devised lands to the children and the specific legacies to one of them and the widow are to bear the burden ratably. Our position is that she takes *in toto* under the will, or *in toto* under the statute ; that she cannot put

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one foot on the statute and one on the will—that she can not blow hot and blow cold. She has her election; but when that is made, we are no longer concerned with the statute if she has selected the will, or with the will if she has selected the statute.

*Glover & Shepley*, and *Hamilton*, for defendants in error.

I. It is not true even in England that personalty was the primary fund for the payment of debts, in case of deficiency of undevised assets, when real estate was not charged with such payment, for from the earliest times devises have been equally and ratably charged with specific legacies in the payment of specialty debts—(Ld. Cowper) *Long v. Short*, 1 P. Wms. 403, 470; *Cases Temp. Talbot*, 54; (Ch. J. Gibson) *Loomis' Appeal*, 10 Penn. 387; (Just. Lowry) *Hallowell's Est.*, 23 Penn. 228; (V. Ch. Shadwell) *Gervis v. Gervis*, 14 Sim. 654; (V. Ch. Knight Bruce) *Tombs v. Roch*, 2 Coll. 489; (Sir Ed. Sugden) *Young v. Hazzard*, 1 Jones & L. 466; (V. Ch. Stuart) *Eddels v. Johnson*, 1 Giff. 29, 30.

II. As in this country land is assets for the payment of all sorts of debts, and as specialities stand on no better footing than simple contract debts, devises must share equally with specific legacies in the case of deficiency of assets for the payment of debts, and this is so when all parties stand in the condition of simple beneficiaries—*Loomis' Appeal*, 10 Penn. 387; *Adams' Eq.* (4th ed.) t. p. 493; *Hallowell's Est.*, 23 Penn. 228.

It is sometimes rather difficult to appreciate the distinction, or the good sense of decisions, made upon the question of what are and what are not specific legacies. If a particular debt or chattel be bequeathed, it is termed a specific legacy; and if the chattel or debt should have in the lifetime of the testator been sold by him, or paid to him, then the legacy fails, and the legacy is said to be *addeemed*. But if a bequest is made of £1,000 in 3 per cent. consols, that is said to be a general legacy; so that if the testator had them at date of the will, and has sold them in his lifetime, his ex-



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ecutor must make the legacy good by purchase of the stock, and the legacy is *not* addeemed.

What, then, are the specific legacies bequeathed to Mrs. Brant? They are, in the language of the will, 1st, "All my household furniture, my silver plate, my library, my horses, harness and carriages, and my pew (No. 51) in the 2d Presbyterian Church," &c. All authorities concur that articles thus described are specific legacies—2 Wms. on Ex'rs, 99; Ford v. Ford, 23 Foster (N. H.) 212; Manning v. Purcell, 2 Sm. & Gif. 284; Gilliatt v. Gilliatt, 28 Beav. 481. 2. "All money due me, in bank or banks, from any corporation or institution, or any individual." As there is no fund from which the money is to be taken, and as it is described as "money due me"—also, as it is described as being "money in bank or banks"—the legacy is specific—Cochran v. Cochran, 14 Sim. 248; Hayes v. Hayes, 1 Keen, 97; Ambler, 309; Duncan v. Duncan, 27 Beav. 386; Manning v. Purcell, 2 Sm. & Gif. 284; Ford v. Ford, 23 N. H. 212; McKidd v. Brown, 5 Grant Ch. & App. (U. Can.) 633. There could be no question as to whether if the testator had said "all money due me in the Bank of the State of Missouri," that it would have been specific. 3. "Twenty-five shares of stock in the St. Louis Cotton Factory, also twenty shares of stock in the Bank of the State of Missouri, also ten shares of stock in the St. Louis Insurance Company, also five shares of stock in the Southern Bank of St. Louis, also five shares of stock in the Bank of St. Louis." Standing alone, without any evidence of what stock the testator owned at the time of the maturing of the will in each of these corporations, there might be a question whether these were specific; but if we are able to show that in each case the stock bequeathed was all he had in the particular corporation at that time, then we make it specific, and evidence is admissible in such cases whether the legacy is general or specific—2 Wms. on Ex'rs, 1000; Att'y Gen'l v. Grote, 2 Russ. & My. 699; Boys v. Williams, id. 689; S. C. 3 Sim. 563; White v. Winchester, 6 Pick. 52, 56. But none of the cases which may be cited against us, cer-

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tainly not in England; and when it is spoken of as shares or stock *in* a certain corporation, but only so many shares of stock *of* a corporation, it is insisted that the use of the word *in*, in connection with the specific number of shares, is equivalent to and means so many shares of stock standing in my name. 4. "All notes or credits, and also all debts, due and to become due to me, not herein otherwise disposed of in this my last will." This legacy is specific, as every test will show—*Ford v. Ford*, 23 N. H. 212, where the words were, "all notes of hand which are payable to me at the date of this codicil," were held to constitute a specific legacy—*Measun v. Carleton*, 30 Beav. 538. "The rest of my property in consols" is a specific legacy—*Foxon v. Foxon*, 10 Law T. (N. S.) 290. There was in this case no residuary bequest to any one.

III. But Mrs. Brant in accepting this provision in lieu of dower is not receiving a bounty, but takes as a purchaser, and the debts are to be paid out of the portions given to persons who are mere beneficiaries.

The law is the same where a general bequest is made by the testator to his wife in lieu of dower for her election to accept a legacy, places her in the situation of a purchaser of what is given her by the will; so also in the case of devises as well as legacies—1 Hill Real Prop. 158, § 54; 2 Wms. on Ex'rs, 1169; 20 Gill & J. 113-14; 1 Bland, 203, *Margaret Halle's case*; *Williamson v. Williamson*, 6 Paige Ch. 305; *Heath v. Dendy*, 1 Russ. Ch. 543; *Reed v. Reed*, 9 Watts, 269; *Lord v. Lord*, 22 Conn. 595; S. C. 23 Conn. 327.

As by our law (§ 4 of law of Dower, R. C. 1855, p. 669) dower is given in personalty as well as in realty, if this proposition be true, the only question to decide is whether Mrs. Brant in accepting these provisions took them in lieu of dower.

1. As to the real estate devised to her by the will. This is beyond question, for the statute expressly says that it shall be taken to be in lieu of dower—R. C. 1855, p. 671, § 15. This disposes not only of the real estate devised to Mrs. Brant, but of the rents derived from it in any event.

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2. As to the personalty devised by the will, it is evident by the terms of the will it is given her in lieu of her dower; and if that intention appear from the whole will taken together, it will be sufficient—*Hamilton v. Beckwater*, 2 Yates, 389; *Herbert v. Wren et als.*, 7 Cranch, 370; *Lord v. Lord*, 23 Conn. 327; *Pemberton v. Pemberton*, 29 Mo. 412-13.

IV. But even in the case of pure beneficiaries our statute has materially changed the common law, and placed all legacies and devises upon a common ground, leaving the estate undisposed of by will to be the fund for the payment of debts, and until the three years have expired holding the incomes and profits of the estate, both personal and real, to make up the deficiency if any.

That the provisions of our administration law have entirely changed the relations existing between real and personal property in the application to the payment of debts is perfectly demonstrable from the following facts:

1. The provision in the statute concerning Administration provides (R. C. 1855, p. 146, § 27) "that any executor or administrator may file a petition praying that the personal estate may be reserved and the real estate sold for the payment of debts, and the Probate Court may thereupon order that the whole or any part of the personal property may be reserved, and the real estate or any part of it may be sold for payment of debts." Is there any absolute primary fund here? Is there any sacredness attaching to real estate? How is this consistent with the idea that the heir is the absolute owner of the land, and its profits subject to be divested only when personal property of every kind is exhausted?

2. The statute further provides (R. C. 1855, p. 136, § 45) that "the administrator or executor *shall* lease the real estate for any term not exceeding three years," and in the 46th section speaks of its being leased for the payment of debts.

V. But in the case of chattels and real estate bequeathed and devised by will, our law, though speaking generally of the duty of an executor as well as an administrator, *first*, to sell the personal property in payment of debts; yet in secs. 47 and 48 of the statute relating to Wills (R. C. 1855, p. 574)

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expressly provides that if any chattels or real estate given by will to any person shall be taken for the payment of debts, "then all the other legatees, devisees and heirs shall refund their proportional part of such loss to such person from whom the bequest shall be taken." It thus supplements the provisions of § 27, art. 3, of the Administration Act, and in this way makes good to any devisee of real estate any real estate that may have been sold under the provisions of that section for the payment of debts by contributions from the other devisees and legatees. So also it supplements another provision, which allows the real estate by order of the court to be turned over to the devisee before the administration is closed, by providing that if the debts should unexpectedly come, and the legatee's portion should be swallowed up or reduced, such devisee may be called upon to make contribution.

VI. The general intent of the will (irrespective of the question whether Mrs. Brant takes as purchaser, or whether by law legatees and devisees equally contribute to make up any deficiency upon failure of the undivided estate to pay the debts) is that the debts shall be paid out of the general estate of the testator.

There is no statute in England that the intention of the will shall govern, and yet there, in a case where there was only a general direction that the testator's debts, funeral and testamentary charges and expenses should be fully paid and satisfied, it was held that the language amounts to charge those debts and expenses on the real estate equally with the personalty—*Irwin v. Ironmonger*, 2 Russ. & My. 538; *Leigh v. Warrington*, 1 Brown's Par. Cas. 511. So in this country, in the case of *Shreeve's Ex'rs v. Shreeve*, 2 Stock. Ch. 390, where the direction was that the executors should pay off and discharge all the testator's debts, that these words charge his whole estate, both real and personal, with the payment of his debts.

So in the case of *Tombs v. Roch*, 2 Coll. 501, Vice Ch. Knight Bruce says, "In truth, I consider it to be perfectly

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correct in principle to say," &c. As in England real estate was not charged with debts unless it clearly appeared such was the intention, similar words have been held to show that intention. See cases collected in 2 Jarm. on Wills (Perkins' ed.) 365-8.

WAGNER, Judge, delivered the opinion of the court.

This was a suit brought by the plaintiff, one of the devisees and son of Joshua B. Brant, deceased, against the defendants, as executors for an account of the rents of certain real estate devised to the plaintiff, and alleged to have been collected and received by the defendants. The petition, in substance, states that the testator Brant, by his last will and testament, divided his real estate into three parts nearly or quite equal to each other, one of which parts he devised to his widow, Sarah B. Brant, who was made executrix, and is also made a defendant in this suit; another to his daughter, Elizabeth Lovejoy McDowell, and the other to the plaintiff; each of said devises being for the life of the said parties respectively, with limitations over. That to the plaintiff, the testator bequeathed the certain stocks in several moneyed and other corporations; that to his daughter he gave no part of his personal estate; that he gave to his sister-in-law, Mary C. Benton, five hundred dollars, and to his niece, Lizzie Brant, also five hundred dollars. That all the rest of his personal and mixed property, embracing his household furniture, bank stock, &c., &c., he gave to his widow, Sarah B. Brant. That the testator did not charge any particular fund with the payment of his debts, but directed that his executors should pay the same out of his estate as soon as convenient after his decease. That the defendants duly qualified and took into their possession the entire estate, and from the time of the death of the testator up to April 1, 1864, received and took all the rents of the real estate, against the protest of the plaintiff, who always claimed that the debts of the testator were payable out of his personal estate. That all debts left by the deceased, and which had been allowed against the

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estate, amounted to the sum of \$42,772.55, and which were paid prior to the month of March, 1864. That there were no debts remaining unpaid, and no liabilities of a contingent nature to which the estate was liable, exceeding \$10,000, and that the personal property and money which came to the hands of the defendants were more than sufficient to pay the debts left by the deceased, and all the legacies, except the bequests of the personal property to the said Sarah B. and the plaintiff. That the defendants have collected all the rents of the real estate, including that devised to the plaintiff, the latter amounting to about the sum of \$45,000, that they had paid to him \$12,204.15, and have in their hands \$32,795.85 belonging to him, and prays that the defendants be ordered and adjudged to account to the plaintiff for the rents of the real estate devised to him, and that in said account the defendants be not allowed credit for any debts, for the payment of which the testator left sufficient personal assets.

The defendants in their answer admit that the deceased, by his will made the several dispositions, devises and bequests set forth in the petition. They state that all the debts thus far allowed against the estate had been paid, amounting to \$67,172.42; and that there were contingent liabilities to the amount of \$15,000. They deny that the personal property and money which came to their hands were more than sufficient to pay the debts, and state that the whole of the said property and money (even if the same were applicable to that purpose) was insufficient to pay the debts. They state that they are advised, and therefore they insist, that by the true construction of the said will, in case the personal estate not specifically bequeathed is insufficient to pay the debts, the amount necessary to complete such a payment must be contributed ratably by the specific legatees and devisees, other than the said Sarah B., or that under the proper construction of the said will and the law applicable to the case, the said Sarah B. can only be compelled to contribute ratably with the plaintiff and the said Elizabeth L. McDowell to the



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payment of the debts. They further insist that by accepting the provisions in the said will in her behalf the said Sarah B. became and was a purchaser for a valuable consideration of the estate and interest so acquired, and that as such she is entitled to have the assets of the estate so marshalled in her favor as to exempt the same from all liability by way of contribution or otherwise on account of debts.

The defendants also insisted that no final decree or judgment could be rendered between the parties in the cause until the administration was finally closed, and that if the plaintiff's petition contained any equity whatever it was that the respective devisees and legatees should be called upon to contribute their portion of whatever amount the share of the plaintiff's may have been made to pay on account of the debts of the testator, above what it was justly liable for. On the trial before the court without a jury, the plaintiff gave evidence tending to prove that if the whole of the personal property had been first applied to the payment of the debts, the amount of the rents collected by the defendants from the real estate devised to the plaintiff was largely in excess of any deficiency which might remain after the application of said personal estate; and also, that if the portion of the personal property not specifically bequeathed had been applied to the payment of the debts, then the rents so collected out of the real estate devised to the plaintiff would be in excess of what would be required from the share of the plaintiff in order to make up the deficiency.

The defendants on their part gave evidence tending to prove that the whole of the personal estate, if first applied to the debts, would have been insufficient to pay all the debts. The court dismissed the petition, and the plaintiff sued out his writ of error.

There was some doubt as to whether the court had jurisdiction over the matter before the close of the administration, and it is believed that it was for that reason that the petition was dismissed; but, as the same subject is again pending,



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and the parties are desirous of having the will construed, we will waive that point and examine the questions arising in the case.

It is insisted for the plaintiff that in the absence of a plain intention to the contrary, the rule is that the personal estate in the hands of the executor is the primary and natural fund, which must be resorted to in the first instance for the payment of debts of every description contracted by the testator, and that no intention appears in the will of the testator Brant to impair or militate against this rule.

On the other hand, it is contended: First, that Mrs. Brant does not stand in the attitude of a person receiving a devise or bequest as a bounty, but that she takes as a purchaser the devises and legacies, being substitutions in lieu of dower, and that her estate should be wholly exonerated in the payment of debts; and secondly, if she is not to be considered as a purchaser, the whole estate, that which is devised as well as bequeathed, must contribute ratably towards the payment of the debts left by deceased.

There is no part of the estate specifically charged with the payment of debts by the testator's will, the language being that all just debts and funeral expenses should be paid by the executors out of the estate as soon as convenient.

The preliminary question as to whether Mrs. Brant takes as a purchaser, so that the estate devised and bequeathed to her shall not be onerated with the burdens against the general estate, must be decided against her. The rights of the widow to dower are much favored by our law, and the statute enumerates certain articles which vest in her absolutely, fully discharged from all liability on account of the debts of the deceased husband, and without regard to the solvency or insolvency of the estate. The statute further makes express provision by which she is to receive a child's part, or in some instances a third of the property, at her election, but subject to the payment of debts.

A widow may always refuse to take under a will as devisee or legatee, and fall back on her claim for statutory dower,

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but she cannot claim under the will and the statute at the same time; she must make her election, and claim under one and reject the other. She took the devises and legacies in this instance in lieu of dower, but subject to any abatement or contribution rendered necessary in the discharge or payment of debts. The testator devised and bequeathed his whole estate in three nearly equal parts. If any difference was made it was in favor of the widow, and from the whole disposition we cannot discover any intent to exonerate her in preference to the other devisees and legatees.

But the next and principal point is, should the personal property be all exhausted before the land devised is subjected to payment? It is undoubtedly true that the general rule has always been understood to be, that the personal estate is the natural and primary fund for the payment of debts, and this will be first applied until exhausted, unless an intention appears, or is to be gathered from the will, that they are to be paid in a different way. The subject of marshalling assets in the administration of the estates of deceased persons has been very extensively discussed by both the elementary writers and the courts, and received a profound and thorough consideration by that great master of equity law Chancellor Kent, in *Livingston v. Newkirk*, 3 Johns. Ch. 312, and where he arrived at the conclusion that the general and natural order of marshalling assets for the payment of debts, is: 1st, the personal estate; 2d, lands descended; 3d, lands devised.

Notwithstanding, it is very clear that a testator may, if he sees fit, give the personal estate as against his heir or any other real representative, discharged of the payment of his debts and legacies; and in such case, the rules of exoneration in favor of the heir or devisee altogether fail of application. And here a most important question arises, what mode or manner of expression in the testamentary disposition will be sufficient to contravene the general rule of law, and destroy the immunity usually accorded to the realty. Cases of this kind can never arise except where it is shown

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that the intent of the testator is in some manner about to be disappointed, and the matter then resolves itself into one of interpretation, the great aim being to learn from the will and all the surrounding circumstances the testator's preferences among his devisees and legatees, so as to apply that intention in fixing the measure of abatement and contribution. In the earlier cases it was laid down that express words were necessary to create an exemption of the personal property, but this has been greatly relaxed and modified by subsequent decisions, and it may now be taken as the established law, that the personal fund will be exempted if the intention of the testator in its favor can be collected from a sound interpretation put upon the whole will. It is only necessary that, from the whole testamentary disposition taken together, there should appear on the part of the testator an intention so expressed as to convince a *judicial* mind that it was meant to charge the real estate so as to exempt the personal, or to make them both abate and contribute ratably—2 Wms. on Ex'rs, 1450.

It is quite impossible to declare any general rule which can operate as a guide upon this question, as the construction of every will in which the point arises must depend mainly upon the individual circumstances of the particular case—*Ibid.* Lord Eldon makes the following observations in *Booth v. Blundell*, 1 Meriv. 219: "On a comparison of all the cases which have arisen, it is scarcely possible to find any two in which the court altogether agrees with itself, there being scarcely a single circumstance that is considered in one case as a ground of influence in favor of the intention, but it is considered in other cases as against the same inference, and I can find no rule deducible from all that has been said on the subject but this (which appears to be a rule supported by all the cases taken together), namely, that since it has been laid down that express words are not necessary to exempt the personal estate, there must be in the will that which is some times denominated 'evident demonstration,' sometimes 'plain intention,' and 'necessary implication,' to operate that intention."

The rule that specific devises was considered as intended to be preferred over specific legacies was derived from England, where, as is well known, land is not regarded as general assets for the payment of debts. But this rule never applied to specialty debts, because land was liable for them, and therefore as to them devises and specific legacies ratably contributed—Long v. Short, 1 P. Williams, 403; Tipping v. Tipping, id. 730; cases Temp. Talb. 54. With us land is assets for all sorts of debts, no distinction being made between simple contract debts and debts by specialty; and although the personal estate is the primary fund for their payment, yet as between the devisees and legatees the same reason does not exist for preferring devises over legacies.

And this is the law in England, where several distinct properties, subject to a common charge, are disposed of among several persons, recourse is had, by the principle of justice, to the doctrine of contribution. Jarman, therefore, says, that if the testator, after commencing his will with a general direction that his debts should be paid, proceeds to dispose specifically of his real and personal estate among different persons, as the charge would affect the whole property so given, real as well as personal, the devisees and legatees must bear their respective shares of the burden *pro rata*—2 Jarm. on Wills, 549; Irwin v. Ironmonger, 2 Russ. & My. 534. And whatever views may have been entertained and announced by learned judges at different times, the above doctrine seems now to be settled by the more recent decisions, and certainly strongly recommends itself to favor by its intrinsic equity and justice—Young v. Hazzard, 1 Jones & L. 466; Tombs v. Roch, 2 Coll. 489; Gervis v. Gervis, 14 Sim. 654; Hallowell's Estate, 23 Penn. 223; Shreeve v. Shreeve, 2 Stock. Ch. 391.

In this case, as before observed, the testator commences his will with a general direction to his executors to pay off and discharge all his debts as soon as can conveniently be done after his decease; his whole estate was liable for his debts, and as it was all disposed of by devise and bequest, and as no specific fund was designated and set apart for the

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payment of debts, the natural presumption is that he intended that the devisees and legatees should contribute ratably to their abatement.

If a man dies intestate owing debts, payment will be made in the regular order pointed out by the statute, commencing with the personalty; but if he devises and bequeaths his whole property specifically, both real and personal, it is an indication that the objects or recipients of his bounty shall have the estate in the proportions designated in the will. Where, therefore, the testator makes various specific gifts of movable and immovable property, and large amounts of debts resulting from contingent liability perhaps, which were unexpected and not contemplated by him at the time of his decease, are proved up against the estate, will it be believed or considered that it was intended by him, that that part of the property which consisted wholly of the realty should be entirely indemnified from his debts by the rest? Or, in other words, that the law should step in and make a distinction where he had made none, and where he had made equal provision for all, and each and every specific devisee and legatee, it should be held that one set of beneficiaries should hold their estate intact, whilst another set should be thrown upon the world destitute and beggared? Yet, the enforcement of the rule, pressed in the argument for the plaintiff, would lead precisely to this result.

The just and equitable manner of construing the will, is to give it such an application as, in the arrangement for the payment of debts, the plan of the testator in the distribution of the property shall fairly be carried out, and no disappointment shall happen to those who appear to have been equally the subjects of his bounty and affection. Of course, this opinion as to the true construction of the will must be considered as applying to the specific devises and legacies, and not to any residuary clauses that may be contained in the instrument.

Let the judgment be affirmed. The other judges concur.

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Allen v. Berry et al.

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HENRY C. ALLEN, Appellant, v. ISAAC L. BERRY AND STEPHEN M. JONES, Respondents.

*Fraudulent Conveyances.*—Conveyances held to have been fraudulent and void as a matter of fact.

*Appeal from St. Louis Circuit Court.*

*Hill & Jewett*, and *Gridley & La Due*, for appellant.

*Sharp & Broadhead*, for respondents.

FAGG, Judge, delivered the opinion of the court.

The only question involved in this case is one of fact, and a careful consideration of the evidence preserved leaves no doubt as to its proper solution. Plaintiff claimed to have purchased the real estate sued for at sheriff's sale under two writs of execution issued from the office of the clerk of the Circuit Court of Franklin county. The suit was instituted in that county in the month of August, 1860. A change of venue was taken to the Circuit Court of St. Louis county, where a trial was had and a decree rendered for the defendants. This decree was affirmed at a general term of that court, and is now brought here by appeal.

Plaintiff's title consisted of two deeds executed by the sheriff of Franklin county, conveying to him the following tracts of land, viz.: One tract containing fifty-one and  $\frac{7}{16}$  acres, and another twenty-two and  $\frac{4}{16}$  acres, situated near the town of Washington in said county; also the one undivided one-half of lots numbered 7 and 8 in that part of the town of Washington called Bassora, and another piece of property in the said town known and designated as the "Hamilton House," with four lots thereto attached. It is alleged that this property had been conveyed in the winter and spring of the year 1859 by the defendant Berry and his wife to the other defendant Jones for the purpose of hindering, delay-



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ing and defrauding Berry's creditors generally and this plaintiff in particular. It is further averred that this conveyance to Jones was made at or about the time that plaintiff had commenced suit against Berry, for the purpose of obtaining the judgments upon which the executions were issued and the property sold as before stated. Also, that there was at the same time a pretended sale to Jones of all the personal property owned by Berry, and that Jones was holding the same together with the real estate aforesaid for the purpose of assisting Berry to carry out his fraudulent designs. A decree was asked for declaring the conveyances to the real estate mentioned null and void, and for a recovery of the same by plaintiff.

The defendants answered separately, denying the allegations of fraud, and each averring the *bona fides* of the transaction. The first mentioned tract was alleged to be the separate property of the wife of the defendant Berry, held in her own right as one of the heirs-at-law of William G. Owens, deceased, and that the same was purchased by Jones for the sum of \$3,000 in money.

A great deal was said in the argument of the case in reference to the circumstances connected with the sale and conveyance of this particular tract, but we think this part of the transaction really cuts no figure in the case. The conveyance was made in February, 1859. Mrs. Berry was then living, but died in the year 1864—all of her children having died previous to that time. The only estate of Berry was a tenancy by the curtesy taking effect at the death of his wife. This plaintiff had no demand against the wife, and is therefore not in a situation to attack this conveyance of her property. The motive which may have prompted her to make it is wholly immaterial.

A minute statement of all the facts in this case, with such comments upon them as would show in detail all of the reasons for the conclusion which has been arrived at, is not ne-



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cessary. We shall content ourselves by an examination of the most prominent points presented, and by disposing of them as briefly as the nature of the case will admit. All that is said, then, must be applied exclusively to the remainder of the property in question.

The consideration for the sale of this property to Jones is alleged to consist of debts due him by Berry, as well as certain other debts and obligations of the latter which he had undertaken to and did afterwards actually pay off and discharge. These several sums, together with about three or four hundred dollars in money paid by Jones at the time the conveyances were executed, it is claimed, were fully equivalent to the market value of the property.

Excluding the acts and declarations of Jones and Berry, and estimating the amount of the debts claimed to have been paid by the conveyance of this property to Jones, with the addition of \$400 in money, the account would stand about as follows :

| <i>Berry to Jones,</i>                |         | <i>Dr.</i>        |
|---------------------------------------|---------|-------------------|
| To am't paid Wood note and interest,  | - -     | \$1,230 00        |
| "      "      "      " (small)        | - -     | 372 00            |
| "      "      E. W. Murphy note, &c., | - -     | 311 55            |
| "      "      "      "                | - -     | 196 00            |
| "      "      Rigney note,            | - - - - | 1,650 00          |
| "      "      taxes,                  | - - - - | 90 00             |
|                                       |         | <hr/>             |
|                                       |         | \$3,849 55        |
| Add am't cash paid Berry,             | -       | 400 00            |
|                                       |         | <hr/>             |
| Whole am't,                           | - - - - | <u>\$4,249 55</u> |

This statement is based upon what is claimed by Jones to be the true amount for what he actually became liable in making the purchase of Berry. Now let us estimate the property at the very lowest figures put upon it by the defendants' witnesses, and we shall have the following :

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|  |           |                   |
|--|-----------|-------------------|
| The 22 acre tract,                             | - - - - - | \$1,050 00        |
| "Hamilton House,"                              | - - - - - | 1,750 00          |
| Bassora lots,                                  | - - - - - | 75 00             |
| Am't placed in his hands by Judge Owens to pay |           |                   |
| Rigney note,                                   | - - - - - | 1,650 00          |
| Do. to pay County mortgage,                    | - - - - - | 1,150 00          |
| Do. to bal. sale of "Hamilton House" over and  |           |                   |
| above the County debt,                         | - - - - - | 850 00            |
| Estimated value of personal property,          | - - - - - | 350 00            |
|  |           | <u>\$6,875 00</u> |

Showing an excess in his hands, over and above the entire amount claimed to have been paid by him, of - - - - - \$2,625 45

But there is no evidence to show that the small note to Wood claimed to have been paid for Berry was so paid, and hence that amount should be added to this balance, viz., - - - - - 372 00

The same may be said of the small note paid to Murphy; but exclude that from the calculation, and the account will show a balance against him of - - - - - \$2,997 45

Nothing is said about the debt to Mary A. Harden, because it seems to be clear that the only note she held against Berry was the one paid by the plaintiff Allen, and which constitutes part of the amount of the judgments he obtained against him.

If, therefore, these conveyances to Jones had been construed as mortgages for the purpose of securing the debts due and owing to Jones, and for which he had agreed to become liable, there would have been property sufficient to have satisfied them all, and still a balance large enough would have remained to pay off the whole amount of indebtedness to Allen. A part of the declarations of Berry might still be sufficient to induce us to give such a construction to

these deeds ; but when the conduct of Berry is considered in connection with the acts and declarations of Jones, there can be no doubt of the fraudulent intent of both.

The statements made by Jones to various parties, and on every occasion when speaking of the purchase of this property, are so inconsistent in themselves, and so completely refuted by the evidence in the cause, as to make it impossible to reconcile them with the idea of good faith on his part.

The testimony of D. Q. Gale, to say nothing of any other fact or circumstance in the case tending to show the intent of Berry in making the conveyances in question, must be taken as conclusive against him. In speaking of these deeds in his examination in chief, he says: "Berry often talked to me about it ; said he intended to pay all but Allen. Berry offered me \$1,400 to compromise all his debts to Allen ; said he would take his own time to pay Allen. Spoke to me often about the sale ; said it was done so he could take his own time to pay Allen." Again, on cross-examination he says: "The last conversation I had with Berry was more than two years after the sale. I do not think Mrs. Berry was then dead. At this last conversation, he said his object in making the sale was to enable him to take his time to pay Allen." This testimony is unimpeached and uncontradicted. We do not conceive that anything more could be required to show the fact that the object was to hinder and delay Allen in the collection of his just demands.

The declarations of Jones made to Judge Owens, and perhaps to other witnesses, show conclusively that he was fully apprised of this object. The finding of the court below we think was not warranted by the testimony. The deeds made by Berry and wife of all the property mentioned, except the tract of land owned by Mrs. Berry in her own right, ought, upon the facts proved, to have been held fraudulent and utterly void as to the plaintiff Allen. Its judgment, therefore, will be reversed and the cause remanded. The other judges concur.

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Collier's Will.

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EDWARD BREDELL AND ALFRED CHADWICK, TRUSTEES UNDER  
THE LAST WILL OF GEORGE COLLIER, DEC'D, Respondents, v.  
SARAH A. COLLIER *et al.*, Appellants.

*Construction of Will—Vesting—Mixed Estate consisting of Realty and Personality,  
Rules applicable to the former prevail—Case considered under both aspects—Trust  
—Discretionary Powers of Trustees—Discretion subsequent—Condition imposing  
extra-judicial duty on Court, not binding.*

The testator George Collier, Sen., by his will, after bequeathing various specific legacies, and making provision for his wife in lieu of dower, by the 17th clause devised and bequeathed the residue of his estate—which was very valuable and consisted principally of realty—to trustees (who were also appointed executors) in trust, for the uses and purposes therein specified. After prescribing the powers and duties of the trustees as to the management, improvement and disposition of the estate, and providing for the education, maintenance and advancement of his children, all of whom he names, he adds: "And when my said son Dwight shall attain the age of twenty-one years, I wish and require my said executors and trustees immediately to settle up my estate, and divide the same out among my said children as hereinafter mentioned, as far as it may be practicable." Each division or partition was to be submitted to the St. Louis Probate Court for its approval, and if approved was to be binding and conclusive. He then continues: "In making partition as aforesaid, I wish and direct that each and all my said children shall receive equal portions or shares, as my affection and parental regard for them all know no distinction. But if, from Providential visitation or unforeseen casualty, or their own bad conduct—none of which contingencies or misfortunes I hope may ever intervene—my said trustees shall think it right and proper and safest and best, under all the circumstances, to make any difference or distinction among my said children or any of them, in making any of the divisions or partitions as above provided for, they are hereby vested with full power and authority to do so, as fully and to all intents and purposes as I myself could do if living at the time; such discrimination always, however, to be subject to the approval of the said Probate Court as aforesaid. But if all my children shall be worthy, no distinction or difference shall be made among them merely because one or some of them may be deemed by my said trustees more worthy than the others of them. The shares or portions of my estate which shall be thus set apart to my children shall be held by them in their own several rights under the full and perfect legal title—to them and to their heirs, executors, administrators, and assigns, forever." All the children named in the said clause survived the testator; but Henry, the youngest, (an infant), and George, Jr., an adult, died afterwards and before the said son Dwight had become of age. George, Jr., died testate, and leaving a widow but no children. *Held*, on petition of the trustees for the advice and

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directions of the court, that George and Henry took vested and transmissible estates under the will.

The law favors the vesting of estates; a devise or bequest therefore in favor of a person *in esse* simply (i. e. without any intimation of a desire to suspend or postpone its operation) confers an immediately vested interest.

Where words of futurity are introduced into the gift, the question arises, whether the expressions are inserted for the purpose of protracting the vesting, or point merely to the deferred possession or enjoyment.

This being a mixed gift or devise, the rules applicable to realty control.

The doctrine of Boraston's case, 8 Coke, 19, recognized and applied.

But no essential difference would be found to exist if the gift concerned personality exclusively. Directions to pay, to transfer, to divide and partition, import a gift, unless restricted by some inconsistent limitation or condition. The constitution of this trust leads irresistibly to the inference that a gift was intended, and that the gift to the trustees was for the benefit of the children only.

The postponement of the division and partition being apparently more for the benefit and convenience of the estate than for any consideration personal to the devisees, could not prevent the vesting.

There is no limitation over of the respective interests, showing any purpose in the testator that the children should not receive their shares at all events. The consequence of holding that the devisees took no immediate interest would be, that, if any of them died before the period of division leaving children, those children would be wholly unprovided for. Parents are not generally actuated by such intentions, and, unless apparent and unmistakable, they will not be ascribed to them.

It is immaterial that the money is not to be paid or the property divided till a future period. It is scarcely distinguishable from a bond for the payment of money at a future date. It is *debitum in presenti*, though *solvendum in futuro*.

The children take by virtue of the will, and not by appointment under the power conferred on the trustees. The action of the trustees is not a condition precedent to the vesting of the estate in the devisees, and whatever power they may have to make a difference or distinction on account of casualty or bad conduct, is a discretion subsequent; nor is there anything to indicate that the testator intended to exclude a child from partition by death. The death of two of the children prevents the trustees from making any distinction or difference as to them, and so far as they are concerned there is nothing to evoke the power given.

The condition that the action of the trustees should be approved by the Probate Court is unimportant. The duty imposed upon the court is wholly extra-judicial, and its sanction could impart no validity to the proceedings. If the trustees neglect or refuse to act, or abuse their trust, they are amenable to a court of equity, which will always assert its jurisdiction in such cases.

*Execution of Testamentary Power.*—The will of G. C., Jr., contained the following clauses: "2. I give and bequeath to my dearly beloved wife, Harriet K.

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Collier, the entire usufruct of my estate, real, personal and mixed, of every description, wherever situated at the time of my death, so that she may enjoy the sole and entire revenue and income thereof during her life. 3. I give to my said wife the absolute right to dispose of one-half of my said property at her decease, by testamentary disposition, as she may deem right and proper." The disposing part of the will of Harriet K. Collier was as follows: "I give to my dear mother, Mary Kearny, the entire property of which I die possessed, wherever situated, real, personal and mixed, of every character and description, including any and all rights acquired by me under the will of my late husband, to enjoy the sole and entire use of the same during her life," &c. *Held*, that here is a direct reference to the power, and in a manner so explicit as to leave no room for doubt as to the intention, and that this was a valid and operative execution of the power.

*Appeal from St. Louis Circuit Court.*

The facts of the case and the circumstances under which the questions arose sufficiently appear in the foregoing syllabus and the opinion of the court. As the principal questions involved the construction of the 17th clause of the testator's will, it is here copied:

"17th. I give, devise and bequeath all the rest, residue and remainder of my estate, not hereby otherwise disposed of, whether real, personal or mixed, of whatever kind and wheresoever situated, unto my said wife Sarah A., my nephew Edward Bredell, and my said friend Alfred Chadwick, as trustees. To have and to hold the same unto them, the said Sarah A., Edward, and Alfred, as joint tenants and not as tenants in common, and unto the survivors or survivor of them, and to the heirs, executors, administrators and assigns of such survivor forever—as trustees in trust for the uses and purposes herein expressed. Said trustees are authorized and empowered to sell and convey any and all the real estate I may die seized or possessed of, lying or being outside of the said city of St. Louis with its present limits, and also to sell or exchange and convey fractions or parcels of lots lying inside of said city whenever they deem it prudent to do so for the interest of my estate, and to take the proceeds thereof and to apply and re-invest the same for the purposes and objects specified in this will and in the manner hereinafter more specifically mentioned as to the incomes of my estate. The property mentioned above in this devise and bequest lying or being in said city of St. Louis, and the proceeds that may be realized under the last clause, and also all



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the property hereby vested in my said trustees, I desire and direct them to keep together as one entire whole (until disposed of as hereinafter provided) and to be managed accordingly as such by them. They are to have the full possession thereof, and to improve, control, manage and dispose of the same, and to receive the issues, incomes and profits thereof, as fully as I could do if living; which issues and profits they are fully authorized and required to invest again as a part of my estate, either in real estate (if possible in the said city of St. Louis) or in good and secure stocks—say of political or municipal corporations, but not in the stocks of any private trading or banking corporation. I desire and will that all my children shall be well educated and taken care of according to the best judgment of my said trustees. And the expenses of the education, the clothing and the medicines of all my children, so long as they shall severally live with my said wife as a part of the family as above mentioned, and also of their entire maintenance and support, if it shall happen that they or any of them shall cease to live with my wife as aforesaid, so soon as that event shall transpire, shall be paid and defrayed by my said executors, and considered and treated as a part of the expenses of my estate and of the management thereof. In addition to the said George and Mary, already mentioned, I have the following children: Margaret D., John P., William B., Maurice Dwight, Thomas F., and Henry Collier. And it is my will and desire that as, and whenever any of my children (prior to the first division or partition that shall be made as hereinafter provided) shall come of age, or become married or settled in life, my said trustees shall advance to any such of them any such amounts of money or property as in their judgment and discretion shall be right and proper, keeping correct accounts thereof. And when my said son Dwight shall attain the age of twenty-one years, I wish and require my said executors and trustees immediately to settle up my estate, and divide the same out among my said children, as hereinafter mentioned, as far as it may be practicable. And if division thereof cannot, without detriment and loss, be then at once effected of the entire estate, I desire and direct that it may be made so far as it can be accomplished; and then, so soon thereafter as practicable, I require a further division to be made; and so on, from time to time, until the whole estate shall be settled and partitioned among my children. And whenever any division or partition shall be made as aforesaid, I require that my said



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executors and trustees shall report the same to the Probate Court of said county of St. Louis for its approval, and if the same shall be approved of by said court, then the same shall be binding and conclusive; and so of any and all divisions that my said executors and trustees shall make as aforesaid. In making partition as aforesaid, I wish and direct that each and all my said children shall receive equal portions or shares, as my affection and parental regard for them all know no distinction. But if from providential visitation or unforeseen casualty, or their own bad conduct—none of which contingencies or misfortunes I hope may ever intervene—my said trustees shall think it right and proper and safest and best, under all the circumstances, to make any difference or distinction among my said children or any of them, in making any of the divisions or partitions as above provided for, they are hereby vested with full power and authority to do so, as fully and to all intents and purposes as I myself could do if living at the time; such discrimination always, however, to be subject to the approval of the said Probate Court as aforesaid. But if all my children shall be worthy, no distinction or difference shall be made among them merely because one or some of them may be deemed by my said trustees more worthy than the others of them. The shares or portions of my estate which shall be thus set apart to my children shall be held by them in their own several rights under the full and perfect legal title—to them and to their heirs, executors, administrators, and assigns, forever. But should my said executors and trustees so determine, they are hereby authorized and empowered to put the share or shares so set apart as aforesaid to any one or more of my said children, in trustees for their sole and separate use and advantage. When the first division or partition as above provided for shall be made, as I have already given to George and Mary an absolute portion or legacy of fifty thousand dollars each, I will and desire that each one of my other children (subject to the discretionary power on that point herein vested in my said trustees) shall first receive, in order to put them on an equality with said Mary and George, a sum or portion which shall be equal to fifty thousand dollars, together with compound interest thereon at the rate of six per cent. per annum, computed from the day when the said portions of Mary and George shall have been received by them, down to the time of such division. That is to say, I wish compound interest at the rate of six per cent. to be computed upon the fifty-thou-

sand-dollar portions I have given to Mary and George, down to the time of the first division ; and when the aggregate of the principal of fifty thousand dollars and of the compound interest thereon at the rate aforesaid shall be ascertained, I wish an equal amount first of all to be given (subject to the discretionary power on that point above vested in my said trustees) to each one of my other children. And I wish and require that the same thing be done and the same course be pursued in regard to any advances that may be made under the foregoing provisions of this will to any of my children on coming of age, or marrying, or becoming settled in life. And when all my said children shall thus be made equal in respect of advancements, or in the portions of my estate received by them respectively, then in the partitions or divisions among them above provided for, they shall all receive equal shares and proportions of my estate, until the whole shall be divided out among them ; subject, however, to the power of discriminating among *them* vested in my trustees as above set forth. After the partition as aforesaid shall first be made, then the annuity hereinbefore given to my said wife, instead of being paid by said executors, shall be paid *pro rata* by and out of, and be charged upon, the portions set apart to her children and so much as shall have been paid to Mary and George over and above the fifty-thousand-dollar legacies given to them as aforesaid, which are never to be charged with any part of the aforesaid annuities."

The questions were submitted to the court upon the printed arguments of counsel.

*A. Hamilton and R. M. Field*, for appellants.

We insist that all of the children having survived the testator, their interests vested at his death ; and that this result not only was intended by him, but is in accordance with the plain and natural construction of the will.

It may be convenient, at the outset, once for all, to refer to certain familiar rules and principles of construction, all more or less applicable to the case.

The well-known formula, that the intention of the testator is to govern in the construction of his will, has found its way into our statute law. To this leading principle all other rules of construction are subordinate and auxiliary.

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The policy of the law and the rules of interpretation require that estates in all cases should be held vested rather than contingent whenever it can be done without perverting the language of the devise—1 Jarm. on Wills, 726; Smith on Exec. Interests, 73; Vanhook v. Vanhook, 1 Dev. & Bat. 589; Fuller v. Winthrop, 3 Allen (Mass.) 60; Burd v. Burd, 40 Pa. 182. Accordingly, where the language of the will renders it doubtful whether it was the intention of the testator to postpone the vesting, or merely the time of payment or distribution, it will be held that the interest is vested—Eldridge v. Eldridge, 9 Cush. 516; Furness v. Cox, 1 id. 134.

This policy is especially applicable to devises or legacies to children, the natural objects of a testator's bounty, on the presumption that he naturally desires their families to succeed to their interests—per Gaston, J., in Vanhook v. Vanhook, 1 Dev. & Bat. 587, cited with approbation in Underwood v. Dismukes, Meigs, 308.

Another rule is, that in construing a will possible as well as actual results are to be attended to; that is to say, the construction must be with reference to circumstances which might have occurred as well as if they had occurred—1 Jarm. on Wills, 766-8; Harcourt v. Harcourt, 26 Law Jour. (Eq. Series,) 538.

I. It will be seen that the 14th and 17th clauses form but one scheme. A synopsis of these will demonstrate that the plan of the testator was to postpone not the vesting but only the final settlement and distribution of his estate during a certain time, for the benefit and convenience of his estate and family, and the education, support and advancement of his children.

By the 14th clause he makes provision for his wife. He devises and bequeaths to her all his household and kitchen furniture, plate, carriages and horses, and all the personal property in the use of his family for ordinary household purposes, including all his slaves except two (who are named), and certain debts due him; and also the use and enjoyment, free from all rent and other charges, of the family mansion,

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so long as she may see fit to occupy the same as a home or place of residence. But if, from the growth of the city, or other causes, she wishes to cease to occupy the said premises as a home or residence, he authorizes and requires his executors, so soon as she shall signify her desire to surrender up the premises to them, to pay to her, as she may require it, the sum of thirty thousand dollars, to be invested in a house and lot, for a residence and home for herself, to be held by her in fee.

In addition to this, he gives to her an annuity of eight thousand dollars, which is to be paid to her during her widowhood. This annuity, during the period of the postponement, is to be raised "principally out of the income" of the estate, and is made subject to the condition, that his wife *shall keep the family together without any charge to any of the children, except for clothing, medicines, and tuition.* In the event of her marriage, the annuity is reduced to six thousand dollars; but she is then *released from all obligation to support any of the children.* The provision for the wife is declared by the testator to have been made upon the distinct agreement between them, that it was to be in satisfaction of her dower.

Having thus provided a home, and, as he had reason to believe, a satisfactory and permanent support for his wife, the only remaining and exclusive objects of his solicitude and bounty were his children. He accordingly addresses himself to the duty of providing for them. By the 17th clause, the entire residue of his estate is given to his children, through the intervention of trustees. A trust term is created, during which the title, as well as the possession both actual and legal, is vested in and given to the trustees, with full and ample power to sell or exchange certain portions of the realty and re-invest the proceeds, and to improve, control and manage the whole property, and to receive and invest the issues, income, and profits. The estate is directed to be kept together as an entirety until the period of division. Noticing that no provision had as yet been made for the ex-

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penses of the education, clothing and medicines of any of the children, and foreseeing that the support provided for them as a part of the household might fail from several causes—that is to say, either the marriage or decease of his wife, or their ceasing to live with her as members of the family—he therefore directs that all the children shall be well educated and taken care of, and that the expenses of their education, clothing and medicines, so long as they constitute a part of the family, and also of their maintenance and support in the event of their ceasing to live with his wife, shall be paid out of his estate. Prior to the division advances are to be made to them as they become of age, or are married or settled in life. Having bequeathed to Mary and George fifty thousand dollars each, absolutely, the others are to receive a like sum, with compound interest at six per cent., to put them on an equality in this respect with Mary and George. All advances are to be equalized, and are to be brought into the final division or distribution. When his son Dwight becomes of age the trust is to cease, the estate is to be settled up and divided out amongst his children immediately, if practicable; and if not, further divisions are to be made from time to time until the whole estate is settled and partitioned amongst them. Each division or partition is made subject to the approval of the St. Louis Probate Court, and if approved, is to be binding and conclusive. The division is directed to be, not amongst *the* children, or *such* of them as may then be living, but amongst them all—all being equally and the equal objects of his bounty and affection. His language is—"In making partition as aforesaid, I wish and direct that each and all my said children [having previously named them with particularity] shall receive equal portions or shares, as my affection and parental regard for them all know no distinction." He then adds, "But if from Providential visitation, or unforeseen casualty, or their own bad conduct—none of which contingencies or misfortunes I hope may ever intervene—my said trustees shall think it right and proper, and safest and best, under all the circumstances,

to make any difference or distinction among my said children, or any of them, in making any of the divisions or partitions as above provided for, they are hereby vested with full power and authority to do so, as fully, and to all intents and purposes, as I myself could do if living at the time;—such discrimination always however to be subject to the approval of the said Probate Court, as aforesaid. But if all my children shall be worthy, no distinction or difference shall be made among them merely because one or some of them may be deemed by my said trustees more worthy than the others of them.” Authority is also given to the trustees, should they so determine, to put the shares of any of the children in other trustees, for their sole and separate use and advantage. On the first division the annuity to his wife is no longer to be paid out of the estate, but is made a direct charge, *pro rata*, upon the several shares set apart to the children, the legacies of \$50,000 each, given to Mary and George, not being subject thereto.

Looking at the case thus, apart from all general reasoning and technical rules, with reference more especially to the actual intention of the testator, and considering the relations of the parties, and his very obvious purpose of benefiting his family and children, as well as the elaborate care manifested to put all of the latter upon a footing of perfect and exact equality in all respects, it would seem impossible to doubt that his intention was, as we have said, to confer upon each and all of his children vested interests at his decease, and to postpone only the final settlement and distribution of his estate.

Waiving for the present the provisions for advancements and education and maintenance (all which, as will be shown in another connection, are indications of immediate vesting), that the testator intended the shares to vest at once at his decease, and regarded them as vested, is evident too from his directions as to the annuity. The estate, it will be observed, was to be settled up and divided out at the time indicated, and on the first division the annuity was no longer to be



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paid out of the estate, but was made a direct charge upon the shares to be allotted in severalty under the division. It was distinctly understood between the testator and his wife that the provisions of the will, so far as she was concerned, were perfectly satisfactory to her, and that she would accept them. But if the shares were not intended to be vested—if, for instance, the death of all the children before the time of distribution, or any other condition, would have defeated them entirely, it is not easy to perceive how either the testator or his wife could have regarded such a provision as a convenient and suitable arrangement for her support.

It will be seen that here we are still on the intention of the testator, and as to how he himself contemplated the interests. It is nothing to the purpose therefore that the widow renounced the provisions of the will; and it may be conceded that the charge would have followed the shares into whose hands soever they might have come. But we insist that the testator could scarcely have meant that his wife's support should be made to depend in the first instance, and solely indeed, so far as he has said anything upon the subject, upon a plan or scheme of distribution which might fail altogether; or, in other words, upon what at best were intended as so many *mere contingencies*.

But there is an interpretative clause which is not without its influence on the question as to the testator's intention. After directing that "each and all of my *said* children shall receive equal portions or shares," and conferring upon the trustees the power of discriminating between them, with the precautionary suggestion mentioned as to its exercise, he adds, "the shares or portions of my estate which shall thus be set apart to my children shall be held by them in their own several rights, under the full and perfect legal title, to them and their heirs, executors, administrators, and assigns, forever." From this, it is clear that he noticed and understood perfectly what he had already done; that while he had given to the children the beneficial interest during the trust, yet still that the interest so given was technically equitable

only, and not legal, the title being in the trustees. He now declares that the shares acquired under the will shall be held by them "under the full and perfect *legal* title"; thus designating the legal in contradistinction to the equitable estate already vested, and clothing the latter with all the attributes of the former. More than this, the superadded phrase, "to them and to their heirs, executors, administrators and assigns forever," although superfluous and ineffectual in itself to enlarge the interests, has a direct bearing upon the question of vesting. As descriptive of the interests, it tends to show that they were intended to be absolute and vested; and is a complete refutation of the notion that the testator designed to preserve the property in his own family, or amongst his lineal descendants.

Then, too, the devise is residuary, and to the testator's children, the exclusive and equal objects of his bounty. These several characteristics favor the vesting.

In the recent case of *Pearman v. Pearman*, 33 Beav. 394, the M. R. says, "In residuary devises and bequests, the decisions show a strong inclination of the courts, in all cases where it is possible, to make the gift vested."

And in *Leeming v. Sherratt*, 2 Hare, 16, Vice Chancellor Wigram says, "If there is any case which declares, as an abstract proposition, that a gift of a residue to a testator's children, upon an event which afterwards happens, does not confer upon those children an interest transmissible to their representatives merely because they died before the event happens, I am satisfied that case must be at variance with other authorities."

Here the devise is to the children *nominatim*, as individuals, and not as a class, (*Bain v. Lescher*, 11 Sim. 397; *Winslow v. Goodwin*, 7 Met. 375,) and there is no clause of survivorship or other disposition of the shares of any who might die before the time appointed for the division. If the testator had intended to confer the benefit of survivorship, the 6th clause of the will shows that he knew how to accomplish that object. Nothing could be more directly hostile to his

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intention than to limit the devise to such only of the children as might be living at the time of distribution. Unless his language, or the context, renders it necessary, the court will not interpolate or introduce into the will a clause or provision the effect of which would be to put the children under such a condition as that none should take unless they were living at the time of distribution, thus making contingent in their inception interests which otherwise would be vested. It would be an improbable intention to impute to this testator, who has expressed himself with such emphasis and so clearly upon the subject of equality amongst his children, whose will indeed teems with the idea of perfect equality, that those who might happen to live to the time of distribution, although having no families dependent upon them, should be preferred to such as might have died but the day previous leaving families needing support.

As the devise is to the children individually and not as a class, and there is no limitation over to survivors or other provision in case of the death of any of them before the time of distribution, if the shares did not vest at the death of the testator, not only is there a failure of the devise as to those originally intended for George and Henry, but as possible as well as actual results are to be looked to, (1 Jarm. on Wills, 766-8; 26 Law Jour., Eq., 538,) if all had died, there would have been an entire failure of the devise of the residue—*Sohier v. Inches*, 12 Gray, 387. Such a construction is not to be accepted unless imperatively required by the terms of the will. We have the authority of the Vice Chancellor in the case of *Leeming v. Sherratt*, just cited, for saying, that if George and Henry had left issue their claim would have been irresistible, although there is no clause substituting issue in the place of parents.

II. This is not the case of a mere power of appointment. It is not a devise or *gift* to the parties named to *give* to the children, or to such of them, and in such proportions, as they might see proper or as circumstances might in their judgment require. The estate is devised in trust, for all the chil-

dren, by name. The children are the *cestuis que trust* to the same extent precisely as if the devising clause were, in express terms, to their use—Booth v. Booth, 4 Ves. 399; Branstrom v. Wilkinson, 7 Ves. 421; Leeming v. Sherratt, 2 Hare, 16; Saunders v. Vautier, Cr. & Ph. 246; Patterson v. Ellis, 11 Wend. 259; Dundas v. Murray, 1 Ham. & M. 429. They take therefore under the trust, and not through the medium of the power, which is only the means of placing them in the possession of their shares. And equality of distribution is the standard fixed by the testator himself. True, he contemplates and provides for the happening of certain events—these are Providential visitation or unforeseen casualty, or the bad conduct of the children; and as to these, he expresses the hope that none of them may ever intervene. Death therefore, which is inevitable, could scarcely have been within his contemplation. Under these special circumstances, authority to discriminate is given to the trustees. But so anxious is the testator that his plan of equality may prevail, that he restricts this power of discriminating by declaring in substance that if all are worthy—that is to say, if their conduct does not bring them within the influence of the power, the trustees shall not indulge in any ideas of comparative merit, but shall treat all alike in that respect; and he subjects the exercise of this power also to the approval of the Probate Court. All of these two sets of children stood towards the testator upon an equal footing. The case therefore, in this particular, is totally unlike that in which a father is seeking by the provisions of his will, the reformation of an unworthy or profligate son, making his reformation a condition precedent to the vesting of his bounty; and it is scarcely necessary to add, that Providential visitations or unforeseen casualties were regarded as mere possibilities. The children were not required by the will to do anything in order to take their shares. The interests were vested, subject to this power of discriminating to be exercised under the circumstances and in the manner indicated by the testator. No one was to be excluded entirely, but all were to

receive something. Even supposing some of them, by their conduct or otherwise, to come within this power, the standard of equality as fixed by the testator himself would still remain untouched as to the others. The vesting cannot be affected by the fact that the proportions are indeterminate, nor is it material that the legal title is to be retained by the trustees until the time of distribution. From the very nature of the case, then, this power of discriminating is in effect but a *condition subsequent*, and can only operate as such in partial defeasance of the interests given. The power will be construed in conformity with the main purpose of the testator in creating the trust, and the court will strive as far as possible to place the objects of the testator's bounty upon the ground most favorable to the vesting, and as taking under the trust itself rather than under the exercise of the power, and will, if possible, affix to the latter such a limited construction as will render it in effect only a condition subsequent. Where a power of selection is given to trustees, the whole class will take a vested interest, subject to be divested by the exercise of the power; and if it is never exercised, the whole class will take equally. But both George and Henry having died, and there being no suggestion that they came within the scope of this power, as to them it is at an end—their interests became, in that respect, absolute.—*Howland v. Howland*, 11 Gray, 477; *Wright v. Wright*, 13 Eng. Law & Eq. 166; *Ridgway v. Woodhouse*, 7 Beav. 433; *Hill on Trustees*, s. p. 69, 79, 490–92; 1 *Roper on Leg.* 420; *Cunningham v. Moody*, 1 Ves. Sen. 174; *Doe v. Martin*, 4 T. R. 39; *Burrough v. Philcox*, 5 My. & Cr. 72.

If, then, it be urged, you cannot “divide out” amongst the dead, nor “discriminate” except between the living, and that therefore the implication is inevitable that the objects should be living at the time of distribution in order that their circumstances and qualifications in the particulars mentioned by the testator might be passed upon by the trustees, the answer is already given—here is a distinct substantive trust for the benefit of all the children equally, in the first instance,

not confined to *the* children or to *such* of them as might then be living—with no clause of survivorship in case of the death of any—where they take under the trust itself and not through the medium of the power, which is merely the machinery for putting them into the enjoyment of their interests—and where the *discretion* of the trustees is confined exclusively to fixing the shares, without any authority whatever committed to them to say who shall take. It is of the essence of a condition precedent that the devisee or legatee is to perform some act, or assume some position, required of him by the testator. Here, as we have said, nothing is directed to be done by the children to secure their interests under the will, and the court will not put them under a condition which the testator himself has not seen proper to impose.

III. The rule where, as in this instance, realty and personalty are blended in the same gift, and by words which create an immediate vested interest as to the realty, is, that the personal estate must be considered as vested also. This rule is especially applicable where, as in this case, the realty constitutes by far the greater portion of the property devised. —James v. Wynford, 1 Small & Giff. 59, 60; Weidman v. Bush, 4 Harris, 511; Raney v. Heath, 2 Pat. & Heath. 206; 1 Jarm. on Wills, 597.

How is it, then, as to the realty? It will be remembered that the devise is to trustees, for the children, with the direction to keep the property together as an entirety during the minority of one of the testator's sons, for the several purposes of raising an annuity for the wife, (the same being made, by the 14th clause, a charge upon the income,)—the education, maintenance and advancement of the children—and the benefit and improvement of the estate in the meantime. The title is vested in the trustees for a term of years, or during the whole period of the postponement. And when the said son arrives at age, the estate is to be settled up and divided out amongst all the children. Compressed into a single sentence, (which is more to our immediate purpose,)



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it is a devise to trustees of the residuary estate, to be kept together for the benefit of the wife and family, the support, education and advancement of the children, and the benefit and improvement of the estate, until the testator's son Dwight shall become of age, when it is to be divided amongst the children.

The following cases and authorities show that this direction to divide does not denote the time of vesting, but only when the shares or interests shall take effect in possession or enjoyment; and therefore that all the children took vested and descendible interests.

Boraston's case, 3 Rep. 19.—Devise of land to A. and B. for eight years, remainder to executors till such time as H. should attain 21; and *when* he should attain 21, that he should enjoy the same in fee. It was held that there was a vested remainder in H.; that the legal construction was, a devise to executors till H. reached 21, remainder to him in fee; and that the remainder was no more contingent than in the common case of a lease for life or for years, remainder over; that the adverb *when* created no contingency, but merely denoted the time when H. should have possession.

There is no substantial distinction between the present case and that just cited; and it may be noticed here that as to real estate, the principle of that case is, that an intermediate interest carved out does not prevent the vesting, whether it be so carved out for the benefit of the devisee or for any other person, and whether it exhausts the whole intermediate rents and profits, or only a part. It is immaterial to what purposes they are applied.—James v. Wynford, 1 Sm. & Giff. 59, 60.

Doe v. Lea, 3 Term R. 41.—Here the testator devised the premises in question to certain persons, in trust, until M. L. should attain the age of 24, on condition that they should, out of the rents and profits, during all that time, keep the buildings in repair. He subsequently devised the same premises to the said M. L. upon and as soon as he should attain 24, and directed the trustees to surrender the premises

accordingly. *M. L.* died under 24. *Held*, that he took a vested and descendible interest.

And see *Mansfield v. Dugard*, 1 Eq. Ca. Abr. 195; *Doe d. Haywood v. Whitby*, 1 Bur. 228; *Den d. Abrahams v. English*, 2 Harrison, 290; *Doe v. Moore*, 14 East, 601; *Doe v. Provost*, 4 J. R. 61; *Summers v. Burtis*, 4 Edw. Ch. 728; *Crosby v. Wendell*, 6 Paige, 548; *Roome v. Phillips*, 24 N. Y. 465; *Torrey v. Shaw*, 3 Edw. Ch. 359; *Winslow v. Goodwin*, 7 Metc. 376; *Johnson v. Valentine*, 4 Sandford, 36; 1 Jarm. on Wills, 734-5, and cases cited in note; 2 Washb. Real Prop. 252.

The sentence commencing, "And when my son Dwight shall attain the age of 21 years," was intended only to fix a limit to the duration of the trust, which was then to cease.

If, then, our position is correct, that this aggregate mass is to be regulated by the rules applicable to real estate, these authorities (to which many others might be added) are conclusive.

IV. But, irrespective of the fact that this is a mixed gift, the result would be the same if it were a bequest of the personalty alone. The same general principles which regulate the vesting of real estate will be found applicable, to a considerable extent, to the personalty.

As to the effect of a simple limitation of time by the word "when," see *May v. Wood*, 3 Bro. C. C. 473; *Love v. L'Estrange*, 5 Bro. Parlt. Ca. 59; *Monkhouse v. Holme*, 1 Bro. C. C. 298; *Booth v. Booth*, 4 Ves. 399; *Hanson v. Graham*, 6 Ves. 246-7.

Where the words in a will are in the present tense, but the direction for the payment is in the future, the fair import of the language is that there is a present gift, to be paid thereafter. A direction in a will for a division of an estate amongst several persons, by the executor, is equivalent to a direction for the payment to the legatees of the respective shares; in such case the interest is vested, and is transmissible.—*Tucker et ux. v. Bull*, 1 Barb. (S. C.) 94, and authorities cited by the court. See also *Clancey v. Dickey*, 2

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Hawks, 514; Everett v. Mount, 22 Georgia, 323; Perry v. Rhodes, 2 Murphy, 140; Childe v. Russell, 11 Metc. (Mass.) 16; Underwood v. Dismukes, Meigs, 299; Eldridge v. Eldridge, 9 Cush. 516; Burd v. Burd, 40 Pa. 182; Everett v. Everett, 29 N. York, 75-6; Snow v. Poulden, 1 Keen, 187; Saunders v. Vautier, Cr. & Ph. 246; Shattuck v. Stedman, 2 Pick. 467; Fairly v. Kleine, Pennington, 551; Guyther v. Taylor, 3 Ired. Eq. 323; Peckham v. Gregory, 4 Hare, 387.

The provisions for advancements and maintenance and education are indications of immediate vesting.—Vivian v. Mills, 1 Beav. 315; Harrison v. Grimwood, 12 Beav. 192; Davis v. Fisher, 5 Beav. 201; Underwood v. Dismukes, Meigs, 308; Everett v. Everett, 29 N. Y. 75-6; Torrey v. Shaw, 3 Edw. Ch. 359; Hodginson v. Barron, 2 Phil. 582.

It may be contended that here is no gift except in the mere direction to divide. If this were conceded, it would be of no special importance. The question in all such cases being one of substance rather than form, depends not so much upon the particular words in which the gift is expressed as upon the general tenor and scope of the whole instrument. Directions to pay, to divide, or distribute, import a gift, unless controlled by other parts of the will. But this is not the case of a mere trust, *uno flatu*, to divide. There is a prior substantive gift to the children through the intervention of trustees, and the time of distribution is disconnected from the gift by a separate sentence. In other words, the terms which look to the future are annexed simply to the distribution, and not to the gift itself. It is a trust for the children, *and* to be divided at the time indicated.—Smith on Exec. Inter. 148; Perry v. Rhodes, 2 Murphy, 142; Cooper v. Pridgeon, 2 Dev. Eq. 98; Furniss v. Fox, 1 Cush. 135; Fulton v. Sawyer, 41 N. H. 202; Torrey v. Shaw, 3 Edw. Ch. 359; 1 Jarm. on Wills, 760-1.

Besides, the case would fall fully and precisely within the well established exception to the rule; for it is obvious that the postponement of the distribution was not from any considerations personal to George and Henry, who were but

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two out of the eight children provided for; but, in short, was for the convenience and benefit of the estate and family, and the support, education and advancement of all the children. In such cases, with the view of assimilating as much as possible the rules of construction regulating real and personal estate, the courts hold, in analogy to the doctrine of Boraston's case, that the interest is vested.

See Smith on Exec. Inter. 163, for an enumeration of the exceptions to the rule; Leeming v. Sherratt, 2 Hare, 16; Peckham v. Gregory, 4 Hare, 396; Fuller v. Winthrop, 3 Allen, 60; 1 Jarm. on Wills, 750, 760, 763-4.

V. The interests were transmissible and devisable. In addition to the authorities cited under our third point, see the following: 1 Jarm. on Wills, 38-43, and notes; Redfield on Wills, 391; Jones v. Roe, 3 Term R. 93-6; Winslow v. Goodwin, 7 Metc. 363.

VI. On the question whether the power conferred by George Collier, Jr.'s will was well executed by the will of Harriet K. Collier, we refer to Standen v. Standen, 2 Ves. 569; Blagge v. Miles, 1 Sto. 445; Hunloke v. Gill, 1 Russ. & M. 525; Maples v. Brown, 2 Sim. 327.

*Glover & Shepley*, and *Henry Hitchcock*, for respondents.

I. The children of this testator did not take at his death vested interests in the trust fund created by § 17 of the will, but interests which he purposely made contingent till after May 6, 1867: such interests were meanwhile not transmissible by descent or devise; and the appellants, claiming solely under the will of George Collier, Jr., through the will of Harriet K. Collier, are not in any event entitled to any share of the trust estate.

As to the will of George Collier, Sen., these conclusions follow equally from,—

1. The legal effect of the provisions in said 17th clause,—
  - (a) In respect to the estate vested in the trustees, and the incidents thereof;

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(b) In respect to the interests conferred on said children :

2. The "scheme" or "general intent" of the testator, as deduced from the whole will.

I. The testator's intention must govern, being lawful (4 Kent, 537; Gen. Stat. Mo. ch. 131, § 49): his "general intent," or "scheme," will prevail over every particular intent inconsistent therewith (16 Mo. 54): such intent must be gathered from the whole instrument, and the construction which best harmonizes and gives effect to the whole is to be adopted (Redf. on Wills, 434-5; 1 Ves. Jr. 194, n. 4; 16 id. 512, n. 1): and the testator shall be presumed to have employed words in their ordinary legal sense, and with a view to their usual legal effect, unless a contrary intent plainly appear.—2 Jarm. Wills, 743-5, XIII.-XVII.

(a) As to the estate of the trustees in the trust fund :

It is devised to them in fee simple and absolutely, by the fullest words of limitation, "in trust for the uses and purposes hereinafter expressed." Then follow specific directions to, and extraordinary discretionary powers conferred upon, the trustees as to the entire property, including powers of sale, exchange, advancement, and final conveyance to new trustees for any child, all in their discretion, and such as without any words of limitation, even without express grant or devise to the trustees, would vest the fee simple in them by necessary implication—Hill on Trust. 236-48; Deering v. Adams, 37 Me. 265; 1 Crui. Dig. 344, n.; 14 How. (U. S.) 499; 1 Ves. Sen. 142; id. 405; 2 B. & Ald. 564; Cowp. 352; 7 Ves. Jr. 201; 16 id. 491, 505; Harton v. Harton, 7 Term R. 652; 10 Johns. 505; 2 Comst. 19; 43 Me. 206; 2 Jarm. Wills, 196-231, and cases cited.

The entire legal estate being devised to the trustees, the children cannot take as remainder-men—4 Kent, 199; Fearne Cont. Rem. 11, 373; 2 id. (Smith Ex. Int.) 57, §§ 149-51, 165; 2 Crui. Dig. p. 203: 16, 1, § 4; 2 B. & C. 930;—nor except by conveyance from the trustees in fulfilment of their

trust, at the time and with reference to the conditions designated, and not till that time capable of being fulfilled; which conveyances the trustees are expressly authorized to make to new trustees in their discretion,—a feature which alone shows the estate of the trustees to be in fee simple as to the whole, and not a term or chattel interest (*Harton v. Harton*, 7 T. R. 652; *cit.* 2 Jarm. Wills, 222; *Hill on Trust*. 241); and that the directions to them for final division confer a power of appointment by whose execution the trust is to be fulfilled—2 Sugd. Powers, ch. 10, vi. 3, p. 158; 1 *id.* ch. 3, sec. 1, § 2, p. 118.

The cases cited by appellants to show that the trustees took only a term or chattel interest are not applicable here. *Boraston's case*, 3 Coke, 19; *Goodtitle v. Whitby*, 1 Burr. 228; *Doe v. Underdown*, Willis, 293; *Doe v. Lea*, 3 T. R. 41; *Doe v. Ewart*, 7 A. & E. 636; *Clancey v. Dickey*, 2 Hawks, 514; *Perry v. Rhodes*, 2 Murphy, 140; *Everett v. Mount*, 22 Ga. 323, and the like, are all based on facts essentially different.

This testator purposely annexes to the *right of enjoyment*, as well as the possible amount, of each child's (probable) interest, an uncertainty which cannot be removed till 1867, and is made to depend upon the personal character and situation of each child at that time. This is the very key of his "scheme," and stamps the beneficial interests which he creates, as *contingent in their nature*, according to his purpose.

But the rule in *Boraston's case*, as declared by *Ld. Mansfield* in *Goodtitle v. Whitby*, 1 Burr. 228, and emphasized by *Sir W. Grant* in *Hanson v. Graham*, 6 Ves. 246-8, applies only "where *an absolute property* is given," which the legatee is to have "at all events." So in many subsequent cases the interests given to be enjoyed *in futuro* were held vested, because the postponement was *not from any consideration personal to the legatee*, but for the convenience or temporary increase of the estate, or the intermediate benefit of some third person, the ultimate gift being finally to take effect *at all events*. In not one of them was any such uncertainty as



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here provided in respect to *the future enjoyment of the ultimate gift itself*. In many cases the ultimate gift was held vested because of special features not found here: as, upon provision for payment of the entire *interim* interest, income, or dividends, to the ultimate legatee (*Fuller v. Winthrop*, 3 Allen, 60; *Davies v. Fisher*, 5 Beav. 209; *Hanson v. Graham*, 6 Ves. 246; *Felton v. Sawyer*, 41 N. Hamp. 202); or provision for *interim* advances "out of *their shares* or portions," words held to import a present gift (*Booth v. Booth*, 4 Ves. 407; *Vivian v. Mills*, 1 Beav. 315; *Torrey v. Shaw*, 3 Edw. Ch. 256); or upon express words of inheritance or succession to the beneficiary (*Saunders v. Vautier*, Cr. & Ph. 248; *Vanhook v. Vanhook*, 1 Dev. & B. Eq. 589; *Doe v. Provost*, 4 Johns. 61); or other facts showing that the postponement of possession related not to the ultimate beneficiary, but to other persons—*Monkhouse v. Holme*, 1 Bro. Ch. 300; *Fairly v. Kline*, Pennington, 551. None of these cases fall within the rule (*Smith Ex. Int.*, or 2 *Fearne Cont. Rem.* §§ 281, 340, *a.*) that if the postponement of possession is such as to render the ultimate interest doubtful or uncertain, the words of futurity will prevent the vesting. But this testator not only leaves in doubt at his death both the amount and the right of enjoyment of each child's interest—requiring for both the final approval of his trustees and of the Probate Court—but disables his trustees from ascertaining any share till 1867, and then requires the Probate Court to approve their decision before it shall be "final or conclusive," in any case. To such a will the rule in *Boraston's*, or the other cases cited, is wholly foreign; and "cases upon wills have no great weight unless they are exactly to the very point, and similar in all respects to the case before the court"—4 Johns. R. 61.

The provisions and directions to the trustees for education of the children, advancements to them, and final division of the estate "as hereinafter mentioned," all rest upon the absolute discretion of the trustees, and confer upon them *powers of appointment* by the execution of which the trusts of the will are to be fulfilled; and only by the conveyances to be

made by the trustees in execution of such powers, and exercising such discretion, can their own fee simple and absolute legal estate be determined—Duke of Marlborough v. Godolphin, 2 Ves. Sr. 61, 73; 1 Sugd. Pow. p. 106, ch. 2, § vi. 2; 2 id. p. 158, ch. 10, § vi. 3; 4 Kent's Com. 316; 2 Hill. Real Prop. 557-8.

In dividing out the estate, the trustees are put by the strongest and most express words *in loco parentis*. They are to judge of the personal conduct, character and situation of each child up to and at the time fixed—May, 1867—and are then to decide whether by reason of “unforeseen casualty, providential visitation, or their own bad conduct,” or *either* of these “contingencies or misfortunes,” it be “right and proper,” &c., &c., to “make any distinction or difference among said children.” If not, each child is to receive an equal share; but if the trustees shall think best to make any discrimination, &c., they are to stand in the testator's shoes, “with full power and authority so to do, as fully,” &c., &c., “as I could do if living at the time”; and while the testator expresses a hope that each child will receive an equal share, the *amount* of each share and their equality, not only on the first but at each successive division, is expressly subjected to “the discretionary power on that point above vested in said trustees.” But the judgment of the trustees was not then to be “final and conclusive” till also approved by the Probate Court; thus adding, or attempting to add, a further and external condition and uncertainty to the exercise of the power of appointment.

The terms in which the trustees' power to discriminate is declared, clearly make it a power to exclude any child coming (in their judgment) within the causes named. They can in either of said “contingencies or misfortunes” do whatever the father of the child, if still living, could have done with his own property—1 Sugd. Pow. p. 538, ch. 7, § v., and cases cited as to powers of exclusion.

These powers being discretionary, the courts cannot control or interpose with their exercise except for *mala fides*

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shown; the trustees alone, acting in good faith, can judge of their duty (Hill on Trustees, 488-90); otherwise the courts would "make a will for the testator instead of expounding it"—Pink v. DeThusey, 2 Mad. 157; French v. Davidson, 3 Mad. 396; 5 Mad. 424; 2 Beav. 236; 19 Ves. 12, 18; 5 Ves. 849; 2 Ves. & B. 225. Their power to divide the estate cannot be exercised till 1867; any attempt to fix any child's share or pass upon his qualifications before then would be void—Co. Litt. 113, *a.*; 4 Kent, 334; 13 East, 118; 1 Sugd. Powers, 334-6; 2 *id.* 174; 8 Barr, 424; 1 Harris, 536; 10 Watts, 274; 8 Wheat. 495; 8 Serg. & R. 299. And in 1867, their decision must relate to "all the circumstances" *at that time*.

The directions to the trustees for final division create in them a power of appointment *to a class*, viz., to the "worthy" children of the testator, being also not disqualified by the other named "contingencies." Such a power must be exercised for the benefit of those living at the time of the appointment—4 Kent, 345, note *d.*; Smith Ex. Int. (2 Fearne Cont. Rem.) §§ 227, 372; 1 Jarm. Wills, 295; 2 *id.* 168-9; 1 Rop. Leg. 489, 629, 632; 4 Russ. 318; 13 East, 526; 1 Ves. & B. 90; 2 Madd. 378; 1 Hill's Ch. 311, 322; 2 *id.* 41; 3 Edw. Ch. 251; 1 Pai. 632. No gift is made to the children *nominatim*; they are named but once, and in a separate sentence, obviously to prevent intestacy under the statute; and it remains uncertain as to each child what his share or interest will be, if any, until the trustees shall decide in 1867 whether he comes within the description of those to whom an equal share is authorized to be then given. To such a will, it is too clear for argument that the rule in Boraston's case, Goodtitle v. Whitby, &c., has no possible application.

This power of appointment is conferred on the trustees for the sole benefit of the testator's children, fulfilling in 1867 the conditions imposed as to character, &c. No allusion is made to any issue, heir, devisee, or other representative of any child, as within the trust for division of the estate. After the division is made and approved, "the shares so set apart

to said children shall be held *by them*, their heirs," &c.; that is, the trustees shall convey whatever shares they may set apart to the children in fee simple. This being a power to appoint and convey to children only, cannot therefore be exercised in favor of any but a child of the testator. This rule is well settled even as against grandchildren, unless where clearly "necessary in order to effectuate a manifest intent of the testator" (4 Kent, 345; 2 Sugd. Pow. 253, 256; 1 Rop. Leg. 68; 2 Jarm. Wills, 70; 3 Ves. & B. 59; 10 Ves. 195; 1 Edw. Ch. 356; 2 Vern. 107); *a fortiori* against strangers, which the appellants are—Hill on Trust. 67; see also per Ld. Thurlow, 1 Cox Ch. Cas. 72; 1 Ves. Sen. 59; 5 Sim. 543.

(b) As to the *nature of the children's interests* under the will:

These are in their nature contingent and not vested; because the right of enjoyment in each case is by the express terms of the will to accrue (if at all) only upon events necessarily dubious and uncertain till after May, 1867. See as to what constitutes a contingent interest, Fearn on Rem. Introd. p. 2; 4 Kent, 203, note *c.*; 2 Crui. Dig. tit. 16, ch. 1, §§ 8-10, 40, pp. 203-4, 211. To hold such interests presently vested or absolute at the testator's death, or before division made and approved as required by the will, and assignable, devisable and descendible meanwhile, is "to make a will for the testator instead of expounding it"—Pink v. De Thuissey, 2 Mad. Ch. 157, 160; 3 Mad. 396; Hill on Tr. 490. His intention is supreme; and the machinery so carefully provided (whether available or not) demonstrates that *he intended* no child should at his death, nor till 1867, have a present fixed right of future enjoyment to any determinate share of his estate; but if so, he intended these interests to be contingent and not vested till then.

These contingent interests *in futuro* are given for reasons, and are to be ascertained in 1867 upon conditions, strictly personal to the children named, and are therefore not trans-

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missible meanwhile by descent or devise—1 Roper Leg. 636, ch. 10, § 7; 6 Ves. 147; Pre. Ch. 173.

It is clearly settled that where an uncertain event forms part of the original description of the devisee, no interest will vest till the uncertainty is removed—Smith Ex. Int. (2 Fear. Rem.) ch. 8, sec. 1, § 281; Duffield v. Duffield, 1 Dow. & C. 268, 314; Leake v. Robinson, 2 Meriv. 362. Here the equality of interests is to depend upon the character, situation, &c., of each child in 1867, to be then passed upon by the trustees, subject to the approval of the Probate Court.

The will creates a power of appointment to be exercised by the trustees in favor of such of the children who shall in 1867 fulfil its conditions. Such children will then take *by virtue of the will but under the power*, and must be then living to receive its benefit; for (per Ld. Hardw., 2 Ves. sr. 73) "it would be absurd that such a power should be exercised in favor of a person already deceased"; and the representatives of those previously deceased cannot take in their stead (1 Rop. Leg. 337; 2 Sugd. Pow. 23; id. 268-9, ch. 14, §§ 2, 17, 19; 4 Vin. Ab. 485; 1 Atk. 469; 3 Ves. & B. 198; 3 Mer. 689; 1 Cox Cha. Cas. 72), for the appointee in such cases takes jointly under the instrument creating and the instrument executing the power, and must therefore, in order to take, both be *in esse* at the date of the latter, and also answer the description required by the former. See Duke of Marlborough v. Godolphin, 2 Ves. Sen. 78. Even had these trustees no discretionary power, in the named contingencies, to exclude any child, yet upon the prior death of any an appointment of the whole to the survivors or survivor would be good (Hill on Trust. 493; 1 Ves. Jr. 299, 310, n. 1 & 2; 2 Sugd. Powers, 260, ch. 15, sec. 1, § 15; 2 Mad. Ch. 533; 1 Ves. Sr. 57; 1 Sim. & Stu. 328; 2 Ves. Sen. 208; 2 Russ. & M. 81; 4 Russ. 318; 6 Ves. 391; 16 Ves. 256; 1 Paige Ch. 632; 3 Edw. Ch. 251); *a fortiori*, when this testator gives his trustees power to discriminate "as fully as I could do if living at the time," against any child in respect to whom, by reason either of "providential visitation, unfore-

seen casualty, or their own bad conduct," the trustees "under all the circumstances" may judge such discrimination to be "right and proper." Here, death has intervened to prevent two of said children from enjoying the bounty which—provided, in 1867, both his trustees and the Probate Court should approve—he intended these children should then receive. The case is clearly within the "contingencies" he names, the first two of which import events beyond human control, and are in no possible sense *ejusdem generis* with "bad conduct." But the appellants' construction deliberately nullifies the testator's purpose, and the court is asked to strike out, instead of effectuating, this vital provision of the will—the discretion so carefully lodged with the trustees.

Another established rule of construction is, that where there is no gift but in a direction to divide, &c., among several persons at a future period, no interest will vest till that period arrives—Smith on Ex. Int. (2 Fearne Rem.) ch. 8, sec. 4, p. 151; 2 Mer. 362; 1 Jarm. Wills, 762. The postponement in such case is annexed to the gift itself, not merely to the enjoyment—2 Fearne Rem. (Sm. Ex. Int.) § 369, p. 196; 1 Rep. Leg. 383; 12 Ves. 75; 3 Edw. Ch. 251; 1 Pai. 632; 1 Russ. & M. 207; 1 My. & C. 132. Here there is not a word of gift to any child (out of the trust fund) in the whole will, except as gathered from the *directions to the trustees* to divide the estate in 1867 "as hereinafter mentioned"; then follow exclusively *directions to the trustees*, including unlimited power in certain contingencies to discriminate as to the amount any child may receive on the final division; which directions cannot take effect, even in the minds of the trustees, till 1867, and through which alone can any child then receive any part of the trust estate.

The framework and legal effect of this 17th clause, therefore, upon established legal principles, are conclusive that the beneficial interests thereby created were contingent in their nature. The testator himself expressly distinguishes between these contingent gifts under § 17 and the direct gifts of \$50,000 each to his two elder children contained in



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§ 15 of his will, by referring (in § 17) to the latter as "the *absolute* legacies or portions I have given," &c. Where a testator uses additional or different words, he is presumed to have an additional meaning—2 Jarm. Wills, 744, xviii.; 28 Ala. 500; 1 Ired. Eq. 59.

It is immaterial whether the requirement of the Probate Court's approval can or cannot be insisted on. The question here is solely on the testator's intention in making such a provision. How could he have intended by § 17 to create presently vested or absolute interests, assignable or devisable before the division and without reference to the discretionary power of the trustees over the amount of each share, and yet have made this approval in 1867 a condition of even the trustees' action being "final and conclusive"?

The authorities show that the existence, not the absence, of a limitation over in case of death, &c., is an argument in favor of vesting—1 Jarm. Wills, 738, note *b.*; 2 P. W. 626; 9 Ves. 233; 3 My. & K. 257; 33 Beav. 397; 2 Pat. & Heath. (Va.) 218. If these interests were contingent, a limitation over was unnecessary, as the prior death of any child would not leave a vested share undisposed of, but simply diminish the number of shares *to be ascertained in 1867*. See Leake v. Robinson, 2 Mer. 388.

The cases cited for appellants without exception lack the essential feature of this will, namely, the discretionary powers conferred on the trustees, and the consequent uncertainty of the right of future enjoyment of any part of the trust estate by the beneficiaries. This is of the essence of a contingent, as distinguished from a vested interest (4 Kent, 203; Fearne on Rem. Introd. 2; 2 Crui. Dig. 203-4, 211), and the conditions of the ultimate right of enjoyment being personal to each child, the possibility dies with him.

II. By comparing the different parts of the will, and deducing from the whole instrument the "scheme" or "general intent" of the testator, the same result is reached.

The first thirteen paragraphs of the will contain a series of legacies, all in terms of direct gift, either to the legatees

named or to trustees for their benefit. No discretionary power is anywhere conferred ; the intent to confer present, absolute titles is unmistakable, and the unequivocal significance of the terms employed in making these bequests sets forth in marked contrast the wholly dissimilar provisions of the 17th paragraph. The former class of terms says, beyond dispute, "We mean to pass present titles and confer fixed rights." The latter as plainly declares that no fixed rights are created, no titles presently vested, in the beneficiaries ; that while the testator does not dispose of the property himself, he appoints agents or trustees who may dispose of it ; while he does not give his property to his children, they are plainly told who may give it to them ; that though they do not get it presently, yet there is a way by which they may get it ; that though he regards them tenderly as his children and probable beneficiaries of his paternal bounty, yet they are contingent beneficiaries ; and though he loves them all equally, yet as to this trust fund he puts all of them under conditions.

The obvious purpose of this scheme was to guard his children against the dangers of wealth, by making its possession dependent on their own conduct and character while the probationary period lasted. For this purpose their mother was appointed co-trustee with the testator's relative, Bredell, and his confidential friend, Chadwick. No child could receive anything before the final division except what the trustees saw proper to give ; the authority to make advances to each "on coming of age, or being married or settled in life," was absolutely discretionary with the trustees ; and in making that division, unlimited power was vested in them to reduce the *amount* to be set apart to any child, if such discrimination should in their judgment be "right and proper," &c. Yet the appellants claim that from the moment of the testator's death one equal eighth of the estate vested absolutely in each child, and was assignable, devisable, and descendible, in spite of trustees and testator both !

The suggestion that the respondents' construction, in case

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either of the deceased children had left a child, would exclude such grandchild from a share on the final division, is simply irrelevant. We have to do with the intention of the testator *solely as deducible from this will*. There is not a word in it about any grandchild or other representative of a deceased child, though the provision authorizing advances to any child on being married distinctly recognizes the possibility of grandchildren before the division. But he does authorize the total exclusion, in the division, of a living child, who might have a dependent family. Nothing in the will indicates that orphan grandchildren were to have greater rights. He chose to disregard his possible grandchildren altogether, and the court sits here not to make a new will for this testator, but to effectuate the will he made. The argument based on the suppositious necessities of imaginary grandchildren is not supported by a syllable in this will, but is an attempt, in the interest of total strangers, to disregard the vital features and nullify the most careful provisions of the instrument. The respondents' theory harmonizes and gives effect to every clause.

III. Even were it true that the representatives of George and Henry Collier are entitled to share in the division of the estate, the appellants have no claim under the will of the former to any part of what he might have received.

The will of George Collier, Jr., gave to his wife, absolutely, certain specified property then owned by him in Texas. It also gave her the use of his estate for life, and power to dispose by will of one-half thereof at her death. Her interest was a mere life estate with testamentary power of appointment over one-half, which if she did not duly execute by her will, the property went at her death to his next of kin—*Rubey v. Barnett*, 12 Mo. 1; *Gregory v. Cowgill*, 19 Mo. 415; 16 Johns. 587; 11 Serg. & R. 16; 13 Ves. 453; 16 Ves. 139; 19 Ves. 87; 1 Sugd. Pow. 120-6.

Harriet K. Collier's will gives to the appellants the entire property of which she may die possessed, including all rights acquired by her under her husband's will. This is no exe-

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cution of the power—*Roake v. Denn*, 1 Dow. & C. 437; *Blagge v. Miles*, 1 Story's R. 426; 13 Ves. 445; 2 Chance on Pow. 84 [1632].

WAGNER, Judge, delivered the opinion of the court.

This is a suit brought by the trustees, under the will of George Collier, deceased, against the widow, the children of the deceased, and certain other persons claiming an interest in the estate. The purpose of the proceedings was to obtain from the court below, as a court of equity, proper instructions and directions for the guidance of the trustees in the construction of the will, in executing their trusts.

They allege in their bill that since the death of their testator, two of his children, who are mentioned in the will as beneficiaries in certain contingencies, have deceased—one of them Henry Collier, an infant; the other George Collier, Jr., an adult, whose last will has been admitted to probate and administration granted thereon in St. Louis county;—that these events, not being among the contingencies expressly provided for in the will of their testator, have given rise to doubts respecting the construction of the will, which the trustees are unwilling to decide without the sanction of the court.

The main question to be decided is whether the devisees George and Henry, took vested and transmissible estates under the will, or merely contingent interests, dependent upon certain conditions. The Circuit Court construed their interests to be contingent, and rendered a decree by which their representatives, and those claiming under them, were debarred of all right or title to any share of the estate derived from them. It is this decree which is now before us for revision.

The testator, Collier, after making several specific bequests in the prior parts of his will, gives, devises and bequeaths, in the 17th clause, all the rest, residue and remainder of his estate, not otherwise disposed of, whether real, personal or mixed, of whatever kind and wheresoever situated, unto his

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wife Sarah A., his nephew Edward Bredell, and his friend Alfred Chadwick, as trustees, to have and to hold the same unto them, the said Sarah A., Edward and Alfred, as joint tenants, and not as tenants in common, and unto the survivors or survivor of them, and to the heirs, executors, administrators and assigns of such survivor forever, as trustees in trust for the uses and purposes in the said 17th clause expressed. He then gives specific and circumstantial directions about the management and disposition of his estate, and the maintenance, support and education of his children. For his two eldest children, George and Mary, he had already provided by an advancement. In addition to these he left the following children, which were all named: Margaret D., John P., William B., Maurice Dwight, Thomas F. and Henry Collier. He then continues: "And it is my will and desire that as and whenever any of my children (prior to the first division or partition that shall be made as hereinafter provided) shall become of age, or become married or settled in life, my said trustees shall advance to any such of them, any such amounts of money or property as in their judgment and discretion shall be right and proper, keeping correct accounts thereof. And when my said son Dwight shall attain the age of twenty-one years, I wish and require my said executors and trustees immediately to settle up my estate, and divide the same out among my said children, as hereinafter mentioned, as far as it may be practicable. And if division thereof cannot, without detriment and loss, be then at once effected of the entire estate, I desire and direct that it be made so far as it can be accomplished; and then, so soon thereafter as practicable, I require a further division to be made, and so on from time to time until the whole estate shall be settled and partitioned among my children. And whenever any division or partition shall be made as aforesaid, I require that my said executors and trustees shall report the same to the Probate Court of said county of St. Louis for its approval, and if the same be approved of by said court then the same shall be binding and conclusive. And so of any and all di-

visions that my said executors and trustees shall make as aforesaid. In making partition as aforesaid, I wish and direct that each and all my said children shall receive equal portions or shares, as my affection and parental regard for them all know no distinction. But if, from providential visitation or unforeseen casualty, or their own bad conduct—none of which contingencies or misfortunes I hope may ever intervene—my said trustees shall think it right and proper and safest and best, under all the circumstances, to make any difference or distinction among my said children, or any of them, in making any of the divisions or partitions as above provided for, they are hereby vested with full power and authority to do so, as fully and to all intents and purposes as I myself could do if living at the time; such discrimination always, however, to be subject to the approval of the said Probate Court, as aforesaid. But if all my children shall be worthy, no distinction or difference shall be made among them merely because one or some of them may be deemed by my said trustees more worthy than the others of them. The shares or portions of my estate which shall be thus set apart to my children, shall be held by them in their own several rights, under the full and perfect legal title—to them and to their heirs, executors, administrators and assigns, forever.” Provision is then made in regard to advances that may be made from time to time, and requiring compound interest to be paid on subsequent portions, so as to make them equal to those who had received prior shares.

It is argued that, by the express terms of the will, the whole legal title to the estate vested in the trustees at the death of the testator, and that when the contingency happened upon which the division or partition was to be made—Dwight attaining the age of twenty-one—the children would receive their portions by appointment, under the power contained in the will, and not directly by the will itself. Our statute, which provides that the intention of the testator must prevail in the construction of a will, is simply declaratory of the rules of law, as they have existed for an almost



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indefinite period. The first thing to be ascertained is what was meant by the testator in framing his will; and if his meaning and intention are not violative of any rules of law, they must be carried out and executed. As wills are generally dissimilar, and one can hardly be found precisely like another, cases are rarely to be met with which are directly apposite, so as to be controlling authority in any new case which may arise. But there are certain rules of law which have grown up and become firmly fixed in the interpretation of wills, which no court is at liberty to disregard, unless the language of the testator, in making the devise, plainly requires it; and one of these rules is, that all estates shall be considered vested rather than contingent. The law is said to favor the vesting of estates, the effect of which principle seems to be, that property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of the gift immediately on the instrument taking effect, or so soon afterwards as such object comes into existence, or the terms thereof will permit. As therefore a will takes effect at the death of the testator, it follows that any devise or bequest in favor of a person *in esse* simply (without any intimation of a desire to suspend or postpone its operation) confers an immediately vested interest—1 Jarm. on Wills, 726, and note by Perk. ; 2 Fearne on Rem. 73. Where words of futurity are introduced into the gift, the question arises whether the expressions are inserted for the purpose of protracting the vesting, or point merely to the deferred possession or enjoyment—Jarm. *ib.* The cases are very numerous bearing upon this subject, and a few of them will be noticed. In Boraston's case, 3 Coke, 19, a testator devised land to A. and B. for eight years, and after the said term the land to remain to his executors, for the performance of his will, till such time as H. should accomplish his age of twenty-one years, and *when* the said H. should come to the age of twenty-one, then to him, his heirs and assigns forever. H. died under twenty-one. It was contended that the remainder was not to vest in him unless he attained the pre-

scribed age ; but the court held it to be vested immediately ; the case being, it was said, nothing else in effect than a devise to the executors, till H. attained the age of twenty-one, remainder to H. in fee ; and that the adverbs of time, *when*, &c., do not make anything necessary to precede the settling (that is, the vesting of the remainder), but merely expressed the time when it should take effect.

In *Goodtitle v. Whitby*, 1 Bur. 228, the testator devised all his messuages, lands, &c., to two trustees and the survivor of them, and the heirs of such survivor (whom he also made executors), in trust that they and the survivor of them, his heirs and assigns, should lay out the rents and profits for the maintenance, education, bringing up and putting out his two nephews ; and when they should attain twenty-one, to be to them and their heirs equally ;—held, an immediate gift to the two nephews, and vested in them immediately, with a trust to be executed for their benefit during their minority.

In *Doe v. Underdown*, Willis, 293, it is said a devise of lands to A. till B. attain the age of twenty-one, and then to B. in fee, gives B. a vested interest descendible to his heirs if he die before twenty-one.

In the case of *Doe v. Lea*, 3 Term R. 41, the testator devised the premises in question to certain persons in trust until M. L. should attain the age of twenty-four, on condition that they should, out of the rents and profits, during all that time, keep the buildings in repair. He subsequently devised the same premises to the said M. L. upon and as soon as he should attain the age of twenty-four, and directed the trustees to surrender the premises accordingly. M. L. died under twenty-four, and it was held by the King's Bench unanimously—Lord Kenyon, C. J., delivering the opinion—that M. L. took a vested and descendible interest.

In the recent case of *Doe d. Cadogan v. Ewart*, 7 Adol. & El. 636, the testator devised his real estate to trustees, upon trust for his wife during widowhood ; and after her decease or marriage again, upon trust to apply the rents towards the maintenance of his daughter until she should attain the age

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of 25 years; and from and after her attaining that age, then upon trust for his said daughter, her heirs and assigns, forever; but in case his said daughter should depart this life without issue, then the testator devised the said real estate over. The daughter, after the decease of the widow, and before she attained the age of twenty-five years, suffered a common recovery; and it was held that such recovery was effectual to acquire the equitable fee simple, she having a vested estate tail in equity at the time.

Jarman seems to lay down the true doctrine, and observes that the construction which reads words that are seemingly creative of a future interest, as referring merely to the futurity of possession occasioned by the carving out of a prior interest, and as pointing to the determination of that interest, and not as designed to postpone the vesting, has obtained in some instances where the terms in which the posterior gift is framed import contingency, and would, unconnected with and unexplained by the prior gift, clearly postpone the vesting. Thus, where a testator devises lands to trustees until A. shall attain the age of twenty-one years, and if, or when he shall attain that age, then to him in fee, this is construed as conferring on A. a vested estate in fee simple subject to the prior chattel-interest given to the trustees, and consequently on A.'s death, under the prescribed age, the property descends to his heir at law; though it is quite clear that a devise to A., if, or when he shall attain the age of twenty-one years, standing isolated and detached from the context, would confer a contingent interest only.

This being a mixed gift, the rules of law applicable to a devise of realty will apply, though, did it exclusively concern personalty, there would be no essential difference, as a few cases will readily demonstrate. Thus in *Clancey v. Dickey*, 2 Hawks, 514, the father of a minor appointed his wife executrix of his will, which contained the following clauses: "It is my will and desire that my negroes shall be kept together until my children arrive at full age or marry, and then to be divided between my beloved wife and children, share and share

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alike equally ;" and, " It is my will and desire that whenever any of my children arrives at full age or marries, that his or her share of my estate be delivered to him or her immediately." In passing upon this, the court used the following language: "Taking the whole will together, and considering that the only legatees in it were his wife and children, who were also residuary legatees, it admits of the same construction as if he had left the negroes to be kept together by his wife, for the benefit of the family, until one of his children should arrive at age or be married, when they were to be divided between them and his wife; thus disannexing the time of division from the substance of the gift."

In *Perry v. Rhodes*, 2 *Murphy*, 140, the question arose upon the construction of the will of Hardy Witherington. He bequeathed all his movable estate, excepting his negroes, to his wife, till his youngest daughter arrived at the age of twenty-one years, and then to be equally divided among his wife and daughters. And as to his negroes, he directed them to be hired out annually till his youngest daughter attained the age of twenty-one, and that his wife should have the money arising from their hire till that time, when they and their increase were to be equally divided among his wife and daughters. One of the daughters died before the youngest of them attained the age of twenty-one years. Held, that her representative was entitled to a distributive share of the negroes, for the right vested immediately, and the enjoyment thereof only was postponed.

In *Everett v. Mount*, 22 *Georgia*, 323, the will contained this clause: "I desire that the balance of my property shall remain together until my youngest child comes of age, each to be clothed and educated out of my estate equal with my other children, and my estate to pay them \$1,000 as they come of age; and when my youngest child comes of age, I wish an equal division of the balance of my property." One of the daughters died under age. It was decided that the legacy vested on the death of the testator.

But it is said that no interest is conferred upon the chil-

dren except in the directions to the trustees. We think otherwise. There are directions to pay, to transfer, divide and partition, which import a gift, unless they are restricted by some inconsistent limitation or condition. The irresistible inference is that a gift was intended in the constitution of the trust, and that the gift to the trustees was for the benefit of the children only.

Of this description was the case of *Felton v. Sawyer*, 41 N. H. 202. In this case a testator gave a trustee, for his daughter, by name, all his estate, to sell, reinvest, and secure, as he should deem expedient; and he was authorized in his discretion to pay to the daughter before she attained twenty-one years of age not exceeding six per cent.; before she became twenty-five, not more than one-third; before thirty, not more than two-thirds; and on or before she became thirty-five, he was to pay over the whole of the estate. It was contended there that there was no gift to the daughter except in the direction to pay, and that as the daughter died before the bequest vested, the estate lapsed for the benefit of the heirs at law or next of kin. The court say the whole property was given to the daughter, though with the intervention of a trustee, and decide that a gift to a trustee was a gift to the *cestui qui trust*, and that the directions as to payment went only to the enjoyment in possession.

The postponement of the payment, division and partition in the case here seems to be more for the benefit and convenience of the estate than for any considerations personal to the heirs and devisees, and where such is the case it is clear that deferring the payment or partition does not prevent the devise or legacy from vesting—*Fuller v. Winthrop*, 3 Allen, 51; *Harris v. Fly*, 7 Paige, 421; *Marsh v. Wheeler*, 2 Edw. Ch. 163; 1 Jarm. 756-63.

Another consideration is, there is no devise over of the respective interests, showing any purpose in the testator that the devisees should not receive their shares at all events. The consequence of the rule that the estate did not vest, and the devisees took no immediate interest, would be, that if

any of the devisees died before Dwight attained the age of twenty-one, leaving children, those children would be wholly unprovided for ; which we will not believe was the intention of the testator. Parents are not generally actuated by such intentions, and unless they are apparent and unmistakable, such intentions will not be ascribed to them.

The testator gives, devises and bequeaths all the rest, residue and remainder of his estate to the trustees, for the uses and purposes expressed. It is immaterial that the money is not to be paid or the property divided till a future period. It is scarcely distinguishable from a bond for the payment of money at a future date. It is *debitum in presenti* though *solvendum in futuro*.

The great error in the argument of the counsel for respondents appears to be, that the children take nothing by virtue of the will, but that they receive their distributive shares by appointment under the power conferred on the trustees. A fair and natural construction of the will rebuts this idea. The estate is devised to them till Dwight becomes of age, and then it is made the duty of the trustees to partition the same among them. The testator gives the trustees power to discriminate in the amounts and shares allotted to each of the children, if from providential visitation or unforeseen casualty, or the bad conduct of any of the children, they should see proper to do so ; this power, however, always to be exercised with the approval of the Probate Court. It may be conceded that the real meaning in the mind of the testator, as to providential visitation or unforeseen casualty is at least indefinite and vague. The words are coupled with bad conduct, and they may perhaps all be referred to the same class. This view would seem to be strengthened from the sentence immediately following: "But if all my children shall be worthy, no distinction or difference shall be made among them merely because one or some of them may be deemed by my said trustees more worthy than the others of them." Providential visitation and unforeseen casualty are certainly not used in their primary etymological sense.



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Accident, casualty or bad conduct might make it highly judicious and proper that the power of discriminating should be used, not for the purpose of cutting off the share of a child entirely who had been unfortunate and indiscreet, but to vary the character or modify the disposition to be made of the property assigned to him. The action of the trustees is not a condition precedent to the vesting of the estate in the devisees, and whatever power they may have to make a difference or distinction on account of casualty or bad conduct is a discretion subsequent.

There is nothing to indicate that the testator intended to exclude a child from partition by death, for there is no such expression in his will, nor is there any devise over in view of such an event. An event has occurred—the death of two of the children—which prevents the trustees from making any distinction or difference as to them, and so far as they are concerned, there is nothing to evoke the power given. We attach no importance to the condition, that any action that the trustees might take in the premises should be approved by the Probate Court before it would be binding and conclusive. The duty imposed upon the court is wholly extrajudicial, and its sanction could impart to the proceedings no validity. Or should the court refuse to act in this extra-official manner, will it be contended that no estate vests? If the trustees neglect or refuse to act, or abuse their trust, they are amenable to a court of equity, which will always assert its jurisdiction in such cases.

We have now disposed of really the only questions before the court, but there is another matter which has found its way into the decree, and, as the parties desire an expression of opinion on it to aid them in making a complete and final adjustment of the estate, we will proceed to examine it.

The will of George Collier, Jr., contained the following clauses: "2d. I give and bequeath to my dearly beloved wife, Harriet K. Collier, the entire usufruct of all my estate, real, personal and mixed, of every character and description, wherever situated at the time of my death, so that she may enjoy

the sole and entire revenue and income thereof during her life. 3d. I give to my said wife the absolute right to dispose of one-half of my said property at her decease, by testamentary disposition, as she may deem right and proper."

Harriet K. Collier died a short time after the decease of her husband George, and the disposing part of her will is in these words: "I give to my dear mother, Mary Kearny, the entire property of which I may die possessed, wherever situated, real, personal and mixed, of every character and description, including *any and all rights acquired by me under the will of my late husband*, to enjoy the sole and entire use of the same during her life," &c. It is now contended that the will of Harriet does not execute the power given to her by her husband, of the right to dispose of one-half of his property by testamentary disposition. The general rule in reference to the execution of powers by will is thus stated by Chancellor Kent, in his commentaries: "In the case of wills it has been repeatedly declared, and it is now the settled rule, that in respect to the execution of a power, there must be a reference to the subject of it, or to the power itself; unless it be in a case in which the will would be inoperative without the aid of the power, and the intention to execute the power becomes clear and manifest. The intent must be so clear that no other reasonable intent can be imputed to the will, and if the will does not refer to a power or the subject of it, and if the words of the will may be satisfied without supposing an intention to execute the power, then unless the intent to execute the power be clearly expressed it is no execution of it"—4 Kent's Com. 335.

Mr. Justice Story, in *Blagge v. Miles*, 1 Story R. 426, gives three classes which have been held to be sufficient demonstrations of an intended execution of power. "1st. Where there has been some reference in the will or other instrument to the power; 2d. Or a reference to the property which is the subject on which it is to be executed; 3d. Or where the provision in the will or other instrument executed by the donee of the power would otherwise be ineffectual, or

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a mere nullity—in other words, would have no operation, except as an execution of the power.” He further remarks that these are not all the cases, and that it was always open to inquire into the intention, under all the circumstances, while he agrees that “the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation.”

In *Maples v. Brown*, 2 Sim. 327, the testator gave £3,000 to trustees, for his daughter for life; remainder to such persons as she should appoint. The daughter, by her will, disposed of all her personal estate, and then gave all sums, messuages, &c., and other interests to which she was entitled under the testator's will. The only reference that was made in the will of the daughter was in these words: “I also give, devise and bequeath unto all and every,” &c., the “interest to which I am, or shall, or may hereafter become entitled under and by virtue of the provisions and directions contained in the last will and testament of my late father.”

It was insisted there, as here, that the testatrix, from the words used, had only disposed of the property in which she had an interest; that she had a life interest only in the £3,000, under her father's will, with a power to appoint the capital, and that she had not executed the power, but given merely what she had an interest in. But the Vice-Chancellor held otherwise, as follows: “The testatrix, in the former part of her will, disposes of all her personal estate; therefore, the words at the latter end cannot refer to what was her own, as they would be superfluous. It is therefore, on a view of the latter words as contrasted with the former ones, that I hold the will to be an execution of the power.” It is not to be denied that, according to the technical niceties formerly existing in the English Chancery courts, the testamentary disposition of Harriet K. Collier would not constitute a good execution of the power contained in the will of her husband. But the question in England has been settled conformably to the intention of the testators, by statutory enactment, and the principle furnished by the authorities above referred to

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seems to be, that if the donee of the power intends to execute, and the method adopted for that purpose is unexceptionable, that intention, however manifested, whether it appears by positive terms or just implication, will amount to a valid and operative execution. The second clause of the will of Harriet K. gives to her mother her entire property of every character and description, including any and all rights acquired by her under the will of her late husband. Here is a direct reference to the power, and in a manner so explicit that there can be no room left for doubt. The intention is so palpable and apparent that it would require the application of artificial, technical rules to destroy the presumption in its favor.

Our conclusion, therefore, is that the will of Harriet K. amounts to, and must be holden a valid and operative execution of the power.

The judgment of the court below will be reversed and the cause remanded. The other judges concur.



JOHN A. AND GEORGE SCHULTZ, Respondents, v. PETER LINDELL, JR., *et al.*, Appellants.

1. *Lands and Land Titles—Confirmations—Surveys—Evidence.*—A confirmation under the act of Congress of June 13, 1812, to a lot, out-lot or common-field lot by virtue of inhabitation, cultivation or possession prior to the 20th December, 1803, supersedes any title under a French or Spanish concession subsequently confirmed by the act of July 4, 1836; but the surveys under the latter confirmation may be used as evidence to show the location and boundaries of the lot confirmed by the prior act.
2. *Conveyances—Description—Evidence.*—Where a particular tract of land cannot be located by the calls for monuments, or for course and distance, the intent of the parties is not to fail if there be any other matter indicative of such intent.
3. *Limitations—Exceptions—Infancy.*—By the act of limitations, R. C. 1825, p. 510, a party within the exceptions of the statute at the time the right of entry accrued, has twenty years after removal of his disability within which to bring his action, and a purchaser under an administrator's sale takes the position of the heir.

*Appeal from St. Louis Court of Common Pleas.*

This was an ejectment to recover possession of a common-field lot conceded to William Bizet, February 7, 1769, and confirmed to his legal representatives by act of Congress of July 4, 1836 (Dec. 286), and surveyed as U. S. survey No. 3,340, and being the same lot cultivated by John B. Provenchere prior to December 20, 1803, and conveyed by Mary Provenchere and John Louis Provenchere to Risdon H. Price by deed dated August 29, 1816.

The defence was a traverse of plaintiffs' title, and the statute of limitations.

At the trial, the plaintiffs gave in evidence the grant to William Bizet for 1×40 arpents, dated February 7, 1769, the confirmation, and the U. S. survey No. 3,340.

William Bizet, by will dated May 30, 1772, devised his estate to his brother Charles Bizet.

Charles Bizet married Marie Papin, January 29, 1774, and entered into a marriage contract of that date establishing the customary community between the parties, to be common in all personal property and in all after-acquired real property; and by the same contract the survivor of the community was to take a life estate in all the property left by the party first dying.

Charles Bizet died May 26, 1780, leaving his widow Marie (who subsequently married John B. Provenchere) and three children, Paul, Antoine and Marie Bizet.

Marie Bizet married Louis Boissy, September 1, 1795, and left five children; she died September 27, 1813; her husband died October 12, 1819.

Antoine Bizet married Cecile Compare, and died leaving issue, who died before their mother, and their title to the land sued for vested in the mother, and was conveyed to Peter Lindell, the defendant, by deed dated —, 1849.

Ve. Marie married John B. Provenchere, 1st September, 1781, and the parties made a marriage contract establishing the customary community.

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Testimony was given by the plaintiff to prove that John B. Provenchere cultivated this lot prior to December 20, 1803, and that the lot was confirmed by act of June 13, 1812.

John B. Provenchere and Marie Bizet had issue John Louis Provenchere and Margaret, who married Pierre Tournot dit Lajoie; she left one son, Pierre Tournot, who conveyed the *locus in quo* to Lindell on 20th June, 1854. Marie Provenchere died January 23, 1819; John B. died in 1814 or 1815.

Plaintiffs presented two chains of title, one under Bizet, and the other under John B. Provenchere.

*Under Bizet.*—Deed from Paul Bizet to John Louis Provenchere, dated August 13, 1833, conveying all his claim in the property of Charles Bizet; deed from John B. Boissy to the same, dated August 20, 1833, to the same purpose and effect; deed from John L. Provenchere to Robert Forsyth, conveying this field lot, the undivided interest, &c., dated January 15, 1838; deed from Robert Forsyth to the plaintiffs in this suit, dated March 1, 1855.

Under this title plaintiffs could only recover six fifteenths of the land.

*Title under J. B. Provenchere.*—Deed from Marie Provenchere and John Louis P. to Risdon H. Price, dated July 29, 1816—acknowledged July 31, 1816, but not recorded until May 17, 1847—by which the parties sold “their title, claim, interest and estate to a lot of 1×40 in the Big (or Grand) Prairie, about three and one half miles west of the town of St. Louis, bounded north by land now belonging to Joseph Lacroix, as it is said, and south by land cultivated formerly and said to belong to one Simoneau; it being the same tract or parcel of which the said John B. Provenchere, in his lifetime, cultivated for many consecutive years prior to 1803.” They warranted the land against themselves, but not against third parties. Deed from R. H. Price to Horatio Cozens, dated May 11, 1825, but not acknowledged or recorded until August, 1846. Horatio Cozens died, and letters of administration were granted July 20, 1826. Deed from administra-



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tor of H. Cozens to Fred. Jenkins, dated April 25, 1848, upon order of sale made September 22, 1847. Horatio Cozens left two children, William H. Cozens, born September 5, 1819, and a daughter, born in September, 1826, three months after her father's death. Deed from Frederick Jenkins to plaintiffs, dated December 16, 1853.

Under this title plaintiffs could claim to recover one half of the land.

The plat of township 47 N., R. 7 E., was put in evidence. This shows that the lot of Joseph (or Louis) Lacroix was four arpents north of the premises sued for, and there was no evidence of any lot cultivated or claimed by Simoneau on the south.

To show an outstanding title under John B. Provenchere, defendants read a deed from Marie Provenchere and John Louis Provenchere, dated July 25, 1816—acknowledged July 25, 1816, and recorded July 29, 1816—by which the parties, as heirs of the late John Baptiste Provenchere, did grant, bargain and sell to Sylvester Labadie and Joseph Phillipson, their heirs and assigns, a lot of land situate about  $3\frac{1}{2}$  miles from the town of St. Louis, at a place commonly known as the Grand Prairie, which lot contains 2 arpents in front by 40 in depth, and is bounded on the north side by a road of 36 feet which separates it from the lot which Pierre Chouteau has acquired of Alexis Marie, and on the south by lot of owner unknown, and which lot belongs to us as having been cultivated for many years by the said John Baptiste Provenchere, lately deceased, of whom we are the heirs. In this deed there was a warranty against themselves, their heirs and assigns, and all the other heirs of J. B. Provenchere.

To show the location of this lot, and that it embraced the *locus in quo*, defendant deraigned a title to himself to a common-field lot of  $2 \times 40$  arpents immediately adjoining the premises sued for, on the north, under Pierre Chouteau, claiming under Alexis Marie.

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February 27, 1806, Alexis Marie, by deed, conveyed to Pierre Chouteau a lot in Grand Prairie of  $2 \times 40$ , bounded north by — Labarge, and south by — Provenchere, and recited that he had made a verbal sale of the land four years previously.

March 2, 1818, Pierre Chouteau conveyed to the heirs of Vincent Bouis this  $2 \times 40$  lot, as bounded north by lot formerly of F. Labarge, and south by lot formerly of John B. Provenchere, deceased.

June 1, 1825, this claim was proved before U. S. Recorder Hunt, and confirmed to A. V. Bouis' legal representatives, for  $2 \times 40$ , as bounded south by J. B. Provenchere, and U. S. survey No. 1,813 was made of the tract so confirmed. The title of Bouis passed to defendant in eighteen hundred and thirty-five.

The confirmation by Recorder Hunt to P. Barribeau of a lot of  $1\frac{1}{2} \times 40$  arpents, March 5, 1825, bounded north by Benito Vasquez, and south by Joseph Lacroix, was also in evidence.

Concession of a lot to William Bizet, February 7, 1769, for a lot of  $2\frac{1}{2} \times 40$  in Grand Prairie, bounded north by widow Hebert, south by widow Dodier, confirmed in 1816, and surveyed as U. S. survey 1,589.

This lot was sold to Charles Bizet by public sale, February 18, 1775, by administrator.

Defendant then showed title in himself to the New Madrid location No. 161, of Joseph Hunot, by patent in 1859, and by deeds commencing from 1818, and also to the New Madrid location of Joseph Conway; and offered evidence to prove that he, and those under whom he claims, had been in possession of these lands, which include the *locus in quo*, from A. D. 1819. Defendant personally had possession of the premises sued for since 1828.

Defendant also dereigned the title of Labadie and Phillipson to this lot, to show that he had obtained such title since suit commenced.

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The title of Riviere dit Bacanné for the lot on the north of the *locus in quo*, and interfering with the Bouis or Marie lot of  $2 \times 40$ , was shown to have passed to defendant in the year 1828.

The testimony of F. Noise for plaintiffs, and of W. H. Cozens for defendants, showed that there was an old Spanish road between the Marie and Provenchere lots. There were other roads running through the prairie. There was no proof nor any evidence tending to prove that J. B. Provenchere ever cultivated the William Bizet lot of  $2\frac{1}{2} \times 40$ , U. States survey 1,589. The testimony of Cozens showed that there was no Spanish road between the William Bizet lot of  $2\frac{1}{2} \times 40$  and that of widow Hebert; that Bizet lot survey 1,589 was not bounded by the lot P. Chouteau claimed under Marie, survey 3,297.

In rebuttal of defendants' evidence, plaintiffs offered in evidence:—Confirmation of a lot in Grand Prairie to Pierre Chouteau under Alexis Marie for a common-field lot of  $2 \times 40$  arpents, confirmed by Recorder Bates in 1816; also, proof and confirmation by Hunt of same lot, bounded north by Ve. Chouteau, and south by lot formerly of Bequette, surveyed as U. S. survey 3,297; a mortgage by Charles Bizet, executor of William Bizet, to Gabriel Cerré, made June 7, 1776, for the lot of  $2\frac{1}{2} \times 40$ , bounded by Cotte and Hebert, released November 12, 1782, to J. B. Provenchere; a deed from Antoine Bizet to John Louis Provenchere, dated September 11, 1817, for the lot of  $2\frac{1}{2} \times 40$ , bounded north by Dodier, south by Hebert, and sold as land of William Bizet, 18th February, 1774.

There was no evidence showing that this lot of  $2\frac{1}{2} \times 40$  of William Bizet was ever cultivated by J. B. Provenchere, and the evidence did not show any Spanish road upon its northern boundary.

The following rough sketch shows the connection of the Grand Prairie common-field lots as laid down on the town-

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ship plat. The two claims of Chouteau under Marie are more than a mile apart:

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 Survey 1262, Mad. Chouteau,  $2 \times 40$ .
 

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*Survey 3297, Pierre Chouteau under Alexis Marie,  $2 \times 40$ .*


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 Survey 3298, P. Chouteau under Pierre Bequette,  $1 \times 40$ .
 

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 Survey 3299, P. Chouteau under Bap. Bequette,  $1 \times 40$ .
 

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 Survey 3300, Ve. Dodier.
 

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 Survey 1589, Wm. Bizet's L. R.,  $2\frac{1}{2} \times 40$ ,

Ve. Dodier  
and  
Ve. Hebert.

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 Survey 1256, Ve. Hebert.
 

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$17\frac{1}{2} \times 40$ .  
Sundry lots.

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 Survey 1662, Benito Vasquez,  $1 \times 40$ .
 

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 Survey 1663, P. Barribeau. S. by Joseph Lacroix.
 

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 Survey 1664, Louis or Joseph Lacroix.
 

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 Survey 1665, Louis Laroche,  $2 \times 40$ .
 

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 Survey 1813, Vincent Bouis  
under P. Chouteau,  $2 \times 40$ ,

S. by Provenchere.

Baccanné  $1 \times 40$

OLD ROAD.

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 Sur. 3340, W. Bizet,  $1 \times 40$ .
 

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J. B. Provenchere,  $2 \times 40$ , N. by road  
separating lot, P. Chouteau bought  
of Alexis Marie.

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For the plaintiffs, the court gave the following instructions, to which defendants excepted :

1. If the jury believe from the evidence that John Baptiste Provenchere, an inhabitant of the town or village of St. Louis prior to the twentieth day of December, (1803) eighteen hundred and three, claimed and cultivated or possessed the lot of land mentioned and described in the petition as a common-field lot adjoining or belonging to the town or village of St. Louis, and was the last claimant and cultivator thereof prior to that date, and that the said John Baptiste Provenchere died prior to the year (1816) eighteen hundred and sixteen, leaving a son, Jean Louis Provenchere, and a daughter, Madame Tournot dit Lajoie, or her descendants, as his only heir or heirs living at his death, and that the deeds given in evidence by the plaintiffs, to show a derivation of title to them from Mary Provenchere and Jean Louis Provenchere, are genuine, and that the lot mentioned in said deeds is the same lot which was so claimed and cultivated or possessed, as aforesaid, by said Provenchere, then the plaintiffs have shown a valid and subsisting title in them to one undivided half of so much of said lot as lies outside of the Madame Camp survey number (903) nine hundred and three by the United States, unless the same has been lost by the operation of the statute of limitations, or unless the jury also believe from the evidence that the lot described and intended to be conveyed in the deed from Marie and Jean Louis Provenchere to Phillipson and Labadie, dated the 25th day of July, (1816) eighteen hundred and sixteen, given in evidence by the defendants, was the same lot as that above herein mentioned within its true location and boundaries.

2. If the jury believe from the evidence that the deed from Marie and Jean Louis Provenchere to Risdon H. Price, dated July 29, 1816, describes the land sued for, and that the deed from Marie and John Louis Provenchere to Phillipson and Labadie, dated July 25, 1816, describes another and a different tract of land, and does not include the land sued

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for, the jury will disregard the said deed to Phillipson and Labadie.

3. If the jury believe, from the evidence, that Horatio Cozens, through whom the plaintiffs claim title, died prior to the twentieth day of July, (1826) eighteen hundred and twenty-six, leaving as his sole heirs his son William H. Cozens, born in the year eighteen hundred and nineteen, and his daughter Mary H. Cozens, born in the year eighteen hundred and twenty-six, and that the defendant, Peter Lindell (now deceased), or those under whom he claims, did not take possession of any part of the lot in controversy before the twentieth day of July, (1826) eighteen hundred and twenty-six, then the plaintiffs are not barred in this case, and have not lost their title by the operation of the statute of limitations.

4. The jury are instructed that the United States survey No. 3,340, given in evidence by the plaintiffs, is evidence of the location, extent and boundaries of the lot which was confirmed by the act of Congress of the 4th of July, 1836, to Guillaume Bizet's legal representatives; and if the jury believe, from the evidence, that the same lot came into the possession of John Baptiste Provenchere, and was claimed or cultivated or possessed by him for himself, an inhabitant of the town or village of St. Louis, as a common-field lot adjoining or belonging to said town or village, as the last claimant or cultivator thereof prior to the twentieth day of December, (1803) eighteen hundred and three, then the said survey is also evidence of the location, extent and boundaries of the lot so claimed and cultivated by him as aforesaid.

Defendants asked the following instructions, which were refused, and defendants excepted:

1. The jury are instructed that the several United States surveys, as marked and defined on the map of Mosberger, given in evidence before the jury, are evidence of a very high character of the true location of the several common-field lots confirmed to the persons named in said map of surveys, and said surveys by the United States are so conclusive of



the true location and boundaries of the lots so surveyed that they control all other calls, whether proved by recitals in deeds, or by parol testimony of witnesses; and if the jury find from the evidence that the United States survey for William Bizet's legal representatives, No. 3,340, calls for a boundary on the north by the United States survey for Bacanné, and for Vincent Bouis under Pierre Chouteau, which Bouis survey included Bacanné, and that the survey No. 3,340 for William Bizet's legal representatives is for the same lot cultivated by John B. Provenchere before 1803, and that the deed of 1816 to Risdon H. Price calls for boundaries by the lot of Joseph Lacroix and of Simoneau, and that the plaintiffs have not proved to the satisfaction of the jury that the lot of Joseph Lacroix or of Simoneau are the boundaries on either side of said survey No. 3,340 for William Bizet's lot in 1816, then the plaintiffs cannot recover in this action, and the jury will find for the defendants.

2. If the jury find from the evidence that the location of the lot of land, according to the boundaries given in the deed from Marie Provenchere and John Louis Provenchere to Risdon H. Price, of 1816, will not cover or include the lot of land sued for, then the jury will find for the defendants.

3. If the jury find from the evidence that they are unable to ascertain the true and specific location of the land described in the deed from Marie Provenchere and John Louis Provenchere to Risdon H. Price, of 1816, by the boundaries given in said deed, then the jury will find a verdict for the defendants.

4. In order for the plaintiffs to recover the lot sued for, it is necessary for them to have proved to the satisfaction of the jury that the deed from Marie Provenchere and John L. Provenchere to Risdon H. Price, of 1816, does describe by its boundaries the same lot of land sued for, as it was known in 1816, and that the deed of Marie Provenchere and John L. Provenchere to Phillipson and Labadie, of 1816, does not describe by its boundaries the lot of land sued for, as it was

known in 1816, and does not include the one by forty arpents sued for in the two by forty arpents described in the deed.

5. If the particulars of description and the calls for boundaries in the deed of Marie Provenchere and John L. Provenchere to Risdon H. Price, of 1816, do not agree with the particulars of description of the lot of land sued for, as it existed and was known and bounded in 1816, then the jury will find for the defendants. The burden of proof is on the plaintiffs to show, by evidence satisfactory to the jury, that the description in the deed of 1816 from Marie Provenchere and son Louis to Risdon H. Price, with its calls for boundaries, covers and conveys the lot of land sued for, as it existed and was known in 1816; and if the jury entertain reasonable doubt as to the location of said lot of land under the boundaries of said deed of 1816 from Provenchere and son Louis to Price, then the jury will find for the defendants.

6. If the jury find from the evidence that the deed of Marie Provenchere and John Louis Provenchere, of 1816, to Phillipson and Labadie contains a description of boundaries that may be applied to the lot sued for, and that the deed of same grantors to Risdon H. Price contains a description of boundaries that are not as applicable to the lot sued for as the deed to Phillipson and Labadie, then the plaintiffs cannot recover.

7. The boundaries called for in a deed overrule and control other and more indefinite calls; and if the defendants have proved to the jury that the lot of Alexis Marie was north of a road separating it from the lot cultivated by Provenchere, and if the plaintiffs have not proved to the satisfaction of the jury that any lot cultivated by Provenchere was bounded by Lacroix or by Simoneau, then the plaintiffs cannot recover.

8. If the jury find, from the evidence, that in the deed of Marie Provenchere and John Louis Provenchere to Risdon H. Price, of the year 1816, the lot described is one by forty arpents of land, bounded on one side by Joseph Lacroix and on the other side by Simoneau, and if the jury are not satis-

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fied by the evidence that the lot now sued for was bounded by Lacroix and Simoneau in 1816, or by either Lacroix or Simoneau in 1816, then the jury will find for the defendants.

9. Unless the plaintiffs have proved to the satisfaction of the jury that the land sued for and described in the survey for William Bizet's representatives is the same lot of land described in the deed from Marie Provenchere and John L. Provenchere to Risdon H. Price, of 29th of July, 1816, and that the said lot of land described in said deed can be located by the descriptive calls for boundaries, so as to cover the lot of land sued for in this action, then the jury will find for the defendants.

10. If the boundaries called for in the deed from Marie Provenchere and John Louis Provenchere to Risdon H. Price described another or different lot of land from the lot of land sued for in this action, and that if the plaintiffs has not proved to the satisfaction of this jury that the boundaries called for in this deed of Provenchere and Provenchere to Price, of 1816, do not describe or cover in terms, by its boundaries, the lot of land now sued for, then the jury will find for the defendants.

11. If the jury find from the evidence that the deed of Marie Provenchere and John Louis Provenchere to Phillipson and Labadie, of 1816, includes the lot sued for, and the jury find that the deed from the same grantors to Risdon H. Price, of 1816, is for another and different lot than the lot conveyed and described in the deed to Phillipson and Labadie, then the jury are directed to disregard the said deed to said Price in examining the case.

12. If the defendants and Peter Lindell, under whom they claim, have prior to the commencement of this suit had twenty years' actual, adverse and continuous possession of the premises sued for, claiming title to the same, then the jury are warranted in presuming conveyance of said premises from the legal representatives of William Bizet to said defendants or their ancestors.

13. If the jury believe from the evidence that Peter Lin-

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dell had, prior to the commencement of this suit, twenty years' actual, adverse and continuous possession of the premises sued for, claiming title to the same, then the jury are warranted in presuming conveyance from the legal representatives of John B. Provenchere to the said Lindell, or those under whom he claims, if the said John B. Provenchere cultivated and possessed said premises prior to the twentieth of December, 1803, claiming title to the same.

14. The deed of Marie Papin, widow of J. B. Provenchere, and of John Louis Provenchere, to Phillipson and Labadie, read in evidence by the defendants, dated July 25, 1816, and recorded July 29, 1816, purports to convey a tract of land of two arpents in front by forty in depth, situated in the Grand Prairie, and bounded on the north by a road of thirty-six feet, which separates it from the lot which Pierre Chouteau acquired from Alexis Marie, and on the south by a proprietor unknown, and which had been cultivated for a number of years by John Baptiste Provenchere, deceased. If, therefore, the jury believe from the evidence that the lot of 2×40 arpents confirmed to Vincent Bouis' legal representatives, and surveyed as United States survey 1,813, under Pierre Chouteau, was the same lot acquired by said P. Chouteau of Alexis Marie, then the lot conveyed by said deed of J. L. Provenchere to Phillipson and Labadie was bounded on the north by said survey No. 1,813, and will include the premises sued for, to-wit, survey No. 3,340, if said survey 3,340 is bounded on the north by survey No. 1,813.

The defendants asked the following instructions, which were given :

15. If the jury find from the evidence that the deed of Marie Provenchere, widow, and John Louis Provenchere, of the 25th of July, 1816, to Phillipson and Labadie, was duly made and executed and recorded in 1816, and that said Marie was the widow and said John Louis was the son of John B. Provenchere, and that said deed to Phillipson and Labadie covers by its boundaries the land sued for, then said

deed conveys to said Phillipson and Labadie a better title than was conveyed to Price by the same grantors, Marie and John L. Provenchere, by the deed of the 29th of July, 1816, to Risdon H. Price, recorded in 1847, and so far as the plaintiffs claim any title under the deed to Price they cannot recover.

16. The deed from John B. Provenchere and Marie Provenchere to Risdon H. Price, dated July 29, 1816, read in evidence by the plaintiffs, calls for a tract of land of  $1 \times 40$  arpents bounded north by Joseph Lacroix, as it is said, and south by land cultivated formerly and said to belong to one Simoneau, and which John B. Provenchere cultivated in his lifetime prior to 1803.

17. The burden of proof is on the plaintiffs to prove to the jury that the land thus described in said deed is the same tract of land confirmed to W. Bizet or his legal representatives, and surveyed as U. S. survey No. 3,340; and unless plaintiffs have made such proof to the satisfaction of the jury, they will find for the defendants.

18. The deed from John L. Provenchere and Marie Provenchere to Phillipson and Labadie, dated July 25, 1816, and recorded July 29, 1816, calls for a tract of land of  $2 \times 40$  arpents in the Grand Prairie, bounded north by a road which separates said tract of land which Pierre Chouteau had acquired of Alexis Marie, and which had also been cultivated for a number of years by John B. Provenchere. If, therefore, the jury believe from the evidence that the lot described in said deed of July 25, 1865, includes the land surveyed as survey No. 3,340, in the name of William Bizet's legal representatives, then the plaintiffs cannot in this action recover any portion of said land under the deed of said J. L. and Marie Provenchere to R. H. Price offered in evidence by the plaintiffs.

19. The deed of John Louis Provenchere and Marie Provenchere to Phillipson and Labadie, read in evidence by defendants, contains covenants of warranty against themselves, their heirs and assigns, and the heirs of J. B. Provenchere;

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and if the jury believe from the evidence that said deed includes the premises sued for, then the title to said premises subsequently acquired by said John Louis Provenchere by virtue of the deeds from Paul Bizet and John B. Boissy, read in evidence by the plaintiffs, immediately vested in the said Phillipson and Labadie by virtue of the covenants in said deeds of John Louis Provenchere to them.

20. If the jury find from the evidence that the land sued for was used and cultivated by John B. Provenchere for several years before the 20th day of December, 1803, as one of the common fields of the Grand Prairie of the town of St. Louis; that said Provenchere was the last cultivator of said lot, and was during said time a resident of the town of St. Louis; that John Louis Provenchere was the son of said John B. Provenchere by Marie Papin, and one of his heirs,—then the act of Congress of June 13, 1812, vested a title in said common-field lot of the Grand Prairie in said John B. Provenchere, and upon his death in his legal representatives; and if the deed of Marie Provenchere and John Louis Provenchere, of the 25th day of July, 1816, to Phillipson and Labadie, covers by its descriptive boundaries the land sued for, then the said deed conveyed to Phillipson and Labadie a better title than was conveyed to Price by the deed of the 29th day of July, 1816, and a better title than was conveyed by the deed of John Louis Provenchere to Robert Forsyth on the 15th day of January, 1838, and the plaintiffs cannot recover in this action.

21. If the jury believe from the evidence that Peter Lindell, claiming under John O'Fallon, entered into possession of the New Madrid location for James Conway, or of a part thereof under claim for the whole, and held possession of the same, and that such possession was open, notorious, adverse and continuous for more than twenty years prior to the commencement of this suit, then the said Lindell, and those under whom he claims, acquired title by the statute of limitations; and the plaintiffs claiming under Horatio Cozens cannot avoid the effect of the statute if said Lindell, and those under



whom he claims, entered into possession at the death of said Horatio Cozens, and held possession as above stated.

22. The jury are instructed that part of the premises sued for, to wit, so much of survey No. 3,340 as lies within the New Madrid location of Joseph Hunot, as surveyed as United States survey No. 2,500, are claimed by defendants under title through said Hunot's representatives. If, therefore, the jury believe from the evidence that Peter Lindell, and those under whom he claims, have had open, notorious and adverse possession of so much of said New Madrid location for Joseph Hunot as includes such part of survey No. 3,340 above described, claiming title to the same for more than twenty years prior to the commencement of this suit, then the defendants are protected by the statute of limitations, and the plaintiffs, although claiming through Horatio Cozens, cannot avoid the effect of the statute if said Lindell, and those under whom he claims title, were in possession of said portion of said survey No. 2,500 prior to the death of said Cozens, claiming under deeds which included that portion of survey 3,340 embraced by survey No. 2,500.

23. So far as any portion of the land confirmed by the act of Congress of the 4th of July, 1836, to William Bizet's legal representatives is covered by the United States survey of the sixteenth section, in township forty-five north of range seven east of the principal meridian, the grant of 1820 of such sixteenth section for the use of Schools is a better title than said confirmation of 1836 to Bizet, and the plaintiffs cannot recover any part of said sixteenth section under said confirmation to Bizet.

24. If the jury find from the evidence that the land sued for was cultivated and used by John B. Provenchere for himself for several years before the 20th day of December, 1803, as one of the common-field lots of the Grand Prairie of the town of St. Louis, that said Provenchere was the last cultivator of said lot, and was during said time a resident of the town of St. Louis, and that said John Louis Proaenchere was the son of said John B. Provenchere, then the act of Congress

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of June 13, 1812, vested a title in said common-field lot of the Grand Prairie in said John B. Provenchere and his legal representatives, his widow and his children, and the confirmation of July 4, 1836, does not vest any title in the heirs of William Bizet to any portion of the said Grand Prairie common-field lot, so used and possessed by John B. Provenchere for himself, prior to the 20th day of December, 1803; and so far as the plaintiffs claim any title under the heirs of William Bizet, for the premises so possessed by John B. Provenchere before 1803, such title cannot prevail in this action.

The court refused the above instructions numbered from one to fourteen, and gave those numbered from fifteen to twenty-four, to which refusal defendants excepted.

The jury found a verdict for plaintiffs for an undivided half of the land, thus establishing the title of J. B. Provenchere by virtue of his cultivation and possession prior to December, 1803, as under the Bizet title he was only entitled to six fifteenths.

The defendants filed their motion for a new trial, which was overruled, exceptions taken, and case appealed.

*Whittelsey*, and *B. A. Hill*, for appellant.

I. The court erred in leaving to the jury a question of law. If the deed of the Provencheres to Phillipson and Labadie described the *locus in quo*, the plaintiffs were not entitled to recover; so also if the deed of Provencheres to Price by its terms did not describe the *locus in quo*, the plaintiffs could not recover.

What are the boundaries of a tract of land described in a deed, and what is the location of land as described, is a matter of law for the court; where those boundaries are as a matter of fact, is a question for the jury—*Whittelsey v. Kellogg*, 28 Mo. 404; *Doe v. Paine*, 4 Hawks, 64; *Doe d. Morgan v. Hurley*, 1 Dev. & B. 425; *Cockrill v. McQuin*, 4 Mon. 61; *Evans v. Green*, 21 Mo. 170; *Ott v. Soulard*, 9 Mo. 581.

The only descriptive call in the deed to Price which applied to the *locus in quo*, is the call for the lot cultivated by

J. B. Provenchere prior to 1803; and that call is also used to Phillipson, "which lot belongs to us as having been cultivated for many years by the said J. B. Provenchere, lately deceased, of whom we are the heirs." There being no evidence before the jury of the cultivation of any other lot in the Grand Prairie by J. B. Provenchere, upon that call alone the deed to Phillipson and Labadie (being of prior date) carried the title, and showed a better outstanding title not vested in the plaintiffs.

As the issue between the parties was, what tract of land was described in the deeds to Price and Phillipson and Labadie, the 1st and 2d instructions given for the plaintiffs were erroneous in leaving the question of law to the jury.

II. The court erred by declaring, as it did by the 4th instruction given for the plaintiffs, that the U. S. survey No. 3,340 of the confirmation to Bizet was evidence of the location, extent and boundaries of the lot claimed and cultivated by J. B. Provenchere. J. B. Provenchere did not claim under Bizet but adversely to him, as appears by the 1st instruction; consequently, it was not the same claim confirmed by two different acts of Congress, as in the case of *City of St. Louis v. Toney*, 21 Mo. 243; but the claims were adverse, and the survey of the Bizet claim did not give location to the claim of J. B. Provenchere under the act of June 13, 1812.

III. The court should have given the 14th instruction asked by defendants. It asked the court, as a matter of law, to instruct the jury how the calls in the deed of Provenchere to Phillipson and Labadie should be applied so as to give location to the tract described in the deed.

By making the Bouis survey (No. 1,813) the northern boundary of the 2×40 sold to Phillipson and Labadie, every call in the deed is satisfied—boundary, Spanish road, and cultivation and quantity—as appeared from the evidence. To make survey 3,297 the northern boundary satisfied one call, but entirely rejected the other two—the old road separating the lots, and the cultivation; for there is no evidence

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that J. B. Provenchere ever cultivated surveys 3,298 and 3,297, nor did the plaintiffs claim that he did. They offered in evidence papers to show that a mortgage upon Sur. 1,589 by Bizet had been satisfied by J. B. Provenchere, who married Bizet's widow; but Sur. 1,589 satisfies no call whatever in the deed, neither boundary, road, cultivation, nor ownership.

There was really no ambiguity created in the deed, by showing that Chouteau had purchased two lots from Marie in the Grand Prairie, and each of 2×40 arpents; for the northern lot of Marie would not satisfy the call of right to convey, of cultivation, nor of the read separating the lots. All the title papers of the Bouis lot (sur. 1,813) call for J. B. Provenchere as their southern boundary in 1806, 1818, and 1825—2 Phil. Ev. (ed. 1859) p. 782, note 520, &c.; 1 Greenl Ev. § 301, p. 369, n. 2.

IV. The disability of William H. Cozens, heir of Horatio Cozens, terminated in 1840, and he had but ten years longer in which to sue, if the adverse possession had continued twenty years (R. C. 1835 & 1845), so that the claim through him would be barred. The plaintiffs claim adversely to the heirs of Horatio Cozens, and cannot set up the disabilities of the heir to avoid the bar of the statute.

V. All the instructions given for the plaintiffs were erroneous, for the reason that J. B. Provenchere's possession was under the Bizet title and not adverse. The title was in C. Bizet; by marriage contract his widow took a life estate. When J. B. Provenchere married the widow Bizet and took possession, it was for his wife's life as as widow of Bizet. When she died, the possession of J. B. Provenchere and Marie Bizet enured to the benefit of the children of the first marriage of said Marie, and the title under the act of 1812 would enure to them; and as they are barred by prescription in Lindell, he holds their title, which is the better title under the act of 1812. There was no evidence of any claim of J. B. Provenchere adverse to that of his step-children.

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*R. M. Field*, and *C. H. Chapin*, for respondents.

I. As to the construction of the deed.

The 1st instruction offered by the defendants, and refused by the court, declares, that if the plaintiffs have not proved that the lot in dispute was bounded by Lacroix and Simon-eau, then they cannot recover. It is an essential requisite of every grant, that it should contain such a description that the subject of the grant may be known; but no particular form is enjoined. However inconsistent and incoherent may be the parts of the description, if, on the whole, the subject of the grant can be fairly ascertained by the triers, they must give the same effect to the grant as if its parts were adjusted with the nicest accuracy. It follows that when the real subject of the grant is ascertained, the repugnant calls are rejected as false or mistaken.

One of the earliest cases on this subject is *Wrotesly v. Adams*, Plowd. 191, in which there was a grant of the farm Bronley, in the tenure of Wilcox, which was not true. The judges held that the word "farm" imported sufficient certainty, and the farther description being false, had no effect.—*Windham v. Windham*, 3 Dyer, 376. In early times, the distinction prevailed between *denomination* or name and *demonstration* or description, the former being regarded as the more worthy; but it is obvious that a name is nothing but a compendious description, and the true reason why it was preferred was, that, being concise and simple, it involved fewer chances of mistake than a complicated and detailed description.—*Blaque v. Gold*, Cro. Car. 447, 473.

Broome lays down the following rule as the result of the English cases: "Where there is an adequate and sufficient description, with convenient certainty of what is intended to pass by the particular instrument, any subsequent erroneous addition will not vitiate it"—*Broome's Max.* 269; *Worthington v. Hillyer*, 4 Mass. 196; *Seaman v. Hogeboom*, 21 Barb. 398; *Abbot v. Pike*, 33 Me. 204; *Harvey v. Mitchell*, 30 N. H. 575; *Smith v. Cheatham*, 14 Texas, 322; *Sawyer v. Kendall*, 10 Cush. 241; *Jackson v. Marsh*, 6 Cow. 281; *Bates v.*

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Bower, 17 Mo. 550; Boardman v. Ford, 6 Pet. 345; Stringer v. Young, 3 Pet. 320.

The following cases are to the same effect: Parks v. Loomis, 6 Gray, 467; Peaslee v. McGee, 19 N. H. 273; Ricker v. Barry, 34 Me. 116; Bosworth v. Sturtevant, 2 Cush. 392; Vose v. Bradstreet, 27 Me. 156; Hall v. Gittings, 2 H. & J. 112; Jackson v. Clark, 7 Johns. 217; Lyman v. Loomis, 5 N. H. 408; Ela v. Corel, 2 N. H. 175; Jackson v. Root, 18 Johns. 60; Ives v. Kimball, 1 Mich. 308; Proctor v. Pool, 4 Dev. 370; 4 Greenl. Crui. 335, in note; Gibson v. Bogy, 28 Mo. 480.

By reference to the description in the deed in the present case, which is the plaintiffs' principal title paper, it will be seen that it contains five particulars: 1. Quantity, one by forty arpents; 2. Situation, in the Big Prairie; 3. Distance from St. Louis,  $3\frac{1}{2}$  miles; 4. Cultivation, by J. B. Provenchere many years before 1803; 5. Boundaries, on the north by Lacroix, south by Simoneau, as is said. It is not pretended that any of these particulars are wanting to the lot in dispute, except the last.

II. Cozens, being the proprietor of the land in dispute, died in July, 1826, leaving two infant children, the elder born in 1819. An entry and adverse holding after the death of Cozens, and during the minority of his children, would fall within the saving of the statute of 1825, which gives to the infant twenty years after attaining full age in which to commence suit. The administrator's deed to the purchaser transmitted the estate just as it existed in the hands of the heirs.

FAGG, Judge, delivered the opinion of the court.

Upon the record of the case, as presented by the appeal from the St. Louis Court of Common Pleas to this court, we find but two points upon which it would seem to be necessary that any opinion should be given; both of these points relate to the direction of the jury as to the law applicable to the facts shown by the testimony.



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This was an action of ejectment, commenced in the St. Louis Land Court and removed by change of venue to the Court of Common Pleas, to recover a lot of one by forty arpents of land conceded to William Bizet on the 7th day of February, 1769, and confirmed to his legal representatives by act of Congress of the 4th of July, 1836. Plaintiffs, for a more perfect description of the premises sued for, allege that this was "the same tract of land which was cultivated and possessed by Jean Baptiste Provenchere prior to the 20th day of December, 1803, as a common-field lot of the Grand Prairie common fields adjoining and belonging to the town of St. Louis, and conveyed by Marie Provenchere, widow of Jean B. Provenchere, deceased, and Jean Louis Provenchere, to Risdon H. Price by deed of the 29th day of July, 1816."

It appears that William Bizet died in 1772, leaving a will by which all of his estate was devised to his brother, Charles Bizet. The latter in 1774 married Marie Papin, and died in 1780 leaving the said Marie his widow and three children, Paul, Antoine, and Marie Bizette. In 1781, Marie Bizet, widow of the said Charles, married Jean Baptiste Provenchere. It is not shown at what exact period of time the said J. B. Provenchere took possession of the land in controversy, but there was testimony introduced by the plaintiffs to prove that he had the actual possession of it and cultivated the same for many years before the 20th day of December, 1803, and that he continued in the possession of the same claiming it as his down to the period of his death in the year 1814. This fact indeed seems not to have been controverted upon the trial. On the contrary, the only paper title shown by the defendants to this property was derived from J. B. Provenchere, with the exception perhaps of the interest of Antoine Bizet in the estate of his father, Charles Bizet, deceased, conveyed to Peter Lindell by deed dated in the year 1849. Plaintiffs, on the trial, presented a chain of title under Bizet to a portion of this land, amounting together to six fifteenths of the whole; but this title seems to have been

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entirely abandoned in the theory of the case as presented by the instructions given at their instance. Their chain of title under J. B. Provenchere consisted of, 1st, a deed from Marie Provenchere, widow, and Jean Louis Provenchere, son of the said Jean Baptiste, to Risdon H. Price, dated July 29, 1816, acknowledged two days afterwards, but not recorded until May 17, 1847. The following is the description of the property conveyed by this deed: "All the right, title, claim, interest, property and estate which we have had or possessed of, in and to a certain tract or parcel of land situate, lying and being at the place commonly known by the name of Big Prairie, about three and a half miles west of St. Louis, and containing one arpent in front by forty arpents in depth, bounded north by land now belonging to Joseph Lacroix, *as it is said*, and south by land cultivated formerly and *said to belong* to one Simoneau, *it being the same tract or parcel of land which the said John Bte. Provenchere in his lifetime cultivated for many consecutive years prior to eighteen hundred and three.*" 2d. A deed from Risdon H. Price to Horatio Cozens, dated May 11, 1825, but not acknowledged or recorded until August, 1846.

Cozens died in 1826, and his administrators, under an order of sale of the Probate Court of St. Louis county made in September, 1847, sold and conveyed the property in question to Fred. Jenkins by deed dated April 25, 1848. Horatio Cozens left a widow and one child, William H. Cozens, who was born September 5, 1819; he had also other issue, a daughter, born in September, 1826, three months after her father's death. Jenkins conveyed to plaintiffs by deed dated September 26, 1853. This suit was commenced in September, 1855. The defence was simply a denial of the plaintiffs' title and a plea of the statute of limitations. It was not pretended under this chain of title that plaintiffs were entitled to more than one undivided one half of said property, as the said J. B. Provenchere left two children, Jean Louis and Margaret. There seems to be no controversy about the fact

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that the entire estate of J. B. Provenchere passed in equal portions to these two children, and plaintiffs were therefore only entitled to the interest of Jean Louis.

The defendants relied, first, upon a deed from Marie Provenchere dated July 25, 1816—just four days previous to the deed from the same parties to Risdon H. Price, and upon which plaintiffs' claim to this property is really founded—recorded July 29, 1816, by which the said parties conveyed all of their right and title to a tract of land described as follows: "*situated about three miles and a half in the western part from the town of St. Louis at the place commonly denominated 'Grande Prairie,' which land contains two arpents in front by forty in depth, and is bounded on the north side by a road thirty-six feet broad, which separates it from the land which Pierre Chouteau bought of Alexis Marie, and on the south side by a land of an owner unknown, on the east and west by vacant lands; which land belongs to us as having been cultivated during a number of years by the said Jean Baptiste Provenchere, deceased, and whose heirs we are,*" &c. This title was acquired by Lindell after the commencement of the suit by plaintiffs. There were shown to be several interferences with the survey of the lot in question, viz., the New Madrid location No. 161 of Joseph Hunot, the New Madrid location of James Conway, and the confirmation of widow Camp (the title to all of which has been acquired by Lindell), and also the sixteenth section; so that, upon the theory that the deed to Phillipson and Labadie of 1816 was intended to pass the title to the lot in question, the claim of defendants was older in point of time, and covered the only interest in the premises to which the plaintiffs could allege any claim whatever. So far as this point is concerned, then, it was not a question of title, but one that related exclusively to the identity of the property intended to be conveyed.

If this question was fairly presented to the jury by the instructions of the court below, the finding ought not to be disturbed. The instructions given on behalf of plaintiffs assumed correctly, as we think, that the confirmation to

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Provenchere of the lot sued for, under the act of June 13, 1812, superseded any title which might have been claimed under the concession of 1769 to William Bizet, and the confirmation to his legal representatives under the act of July 4, 1836; the latter confirmation and survey No. 3,340 serving no other purpose than as links in the chain of evidence to fix the location of the tract which J. B. Provenchere had cultivated prior to December 20, 1803. So vague and indefinite are the calls in the deed to Price, that many collateral facts and circumstances were introduced for the purpose of throwing additional light upon this question of identity, but we do not feel called upon to examine them. We confine ourselves strictly to the point of objection made by the appellants.

There was no such call for the lines of adjoining proprietors as would justify the court in saying to the jury that established lines were called for, and that the grant to plaintiffs must be adjusted to these lines; and if they could not be found by the testimony, the land sued for was not the land intended to be conveyed by the deed to Price. The descriptions in the two deeds of Marie and Jean Louis Provenchere to Price and to Phillipson and Labadie were in many respects similar. In both the land is said to be situate in the Grand Prairie, about three and one half miles west from St. Louis. The deed to Price conveyed a lot of "*one by forty arpents,*" and being the same cultivated by Provenchere "*for many consecutive years prior to 1803*"; the deed to Phillipson and Labadie conveyed a lot of "*two by forty arpents,*" claimed to belong to the grantors by reason of the fact that the same had "*been cultivated for many years by the said John B. Provenchere, deceased.*" The testimony showed that the lot sued for answered the description as to quantity, and although that should not ordinarily be taken as a part of the description, yet there are many cases in which it must be so taken. Here were no natural or artificial monuments referred to, no courses and distances, and no established lines of known proprietors; but it is a lot of certain dimensions,

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situated in a certain locality, containing many lots of different sizes, and designated as the one cultivated for many years prior to a fixed period of time and by a certain individual. These were all parts of a description that must necessarily be taken into consideration in settling the question of identity, and the court permitted them to go to the jury without telling them that any one of these parts controlled the location. The lot claimed by defendants was just double the size of the one sued for in cultivation for "many years," it is true, by the same individual, but not at any fixed period of time. The whole question of identity was, we think, fairly presented by the instructions, and we are not disposed to disturb the verdict on that account.

It cannot be said of the calls in either one of these deeds, that they were intended to apply to a particular tract of land, the boundary lines of which were so fixed and established as to be absolutely certain in their character, or that they could be definitely determined from anything that was referred to as fixed and established. At all events, in attempting to settle the intentions of the parties to the deed of Marie and Jean Louis Provenchere to Price, we think the directions of the court to the jury placed the whole matter in a light most favorable to the defendants, and they really have no ground of complaint. The rule seems to be pretty well settled by the authorities, that where a particular tract of land cannot be located by the calls for monuments, or for course and distance, "the intent of the parties is not to fail if there be other matter in the instrument indicative and certain of such intent"—*Seaman v. Hogeboom*, 21 Barb. (S. C.) 398, and the cases there cited.

The only remaining question to be considered is the plea of the statute of limitations. The testimony shows that Horatio Cozens (the person to whom Price conveyed) died in July, 1826, and that two minor children survived him—the eldest born in 1819, and the youngest three months after his death. By the act approved February 21, 1825 (R. C. 1825, p. 510), real or possessory actions were limited to

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twenty years after the right of action accrued, saving to infants, femmes coverts, &c., after the removal of their disabilities. The right and title acquired by the heirs-at-law of Cozens was not extinguished until the year 1848, when his administrators conveyed to Jenkins, and the estate passed to him with all the rights that attached to it in the hands of the heirs. The proof was that the actual possession of this tract by Lindell commenced after the death of Horatio Cozens, and the eldest child would not have been barred before the year 1860. The possession of Lindell, so far as it related to this identical tract, was without even color of title down to the year 1849.\* The question of the identity of the lot having been determined in favor of the plaintiffs, it excludes the idea that this was the property intended to be conveyed by Marie and Jean Louis Provenchere to Phillipson and Labadie. The defendants, therefore, have no right to complain that the deed of the same parties to Price, and upon which rests the claim of plaintiffs, was not recorded until the year 1847.

The judgment of the Court of Common Pleas is affirmed. Judge Wagner concurs; Judge Holmes not sitting, having been of counsel.



THE BOARD OF PRESIDENT AND DIRECTORS OF THE ST. LOUIS PUBLIC SCHOOLS, Appellants, v. DAVID R. RISLEY AND SARAH RISLEY, by her curator GEORGE D. HUMPHREYS, heirs of WILLIAM RISLEY, deceased, Respondents.

1. *Lands and Land Titles—Accessions—Riparian Rights.*—A lot in a town or village may be entitled to the riparian right of accretions, the right turning upon the question whether or no the lot had a front upon the river. See *Jones v. Soulard*, 24 How. 51; *Smith v. Pub. Schools*, 30 Mo. 301; *LeBeau v. Gavin*, 37 Mo. 556.

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\* Lindell had been in possession from the year 1828, claiming title under the New Madrid locations of Hunot and Conway, which covered the premises sued for. (See statement.)—REF.



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2. *Evidence—Tax Receipts—Hearsay—Limitattons.*—Evidence as to the payment of taxes is admissible in suits for the possession of land for the purpose of showing adverse possession, or the extent and boundaries of the land possessed.
3. *Practice—Trials—Exceptions.*—Where objections are made to the admission of evidence, the bill of exceptions must show the reasons upon which the objections were founded.
4. *Practice—Trials—Evidence—Discretion.*—The Supreme Court will not review the discretion of the inferior court in admitting evidence out of its proper order.
5. *Evidence—Hearsay—Public Rights.*—Tradition, reputation and hearsay are admissible to prove the extent, character and existence of public rights as regards the location and boundaries of things of a public nature, as of a highway, street, or road.

*Appeal from St. Louis Circuit Court.*

The court gave the following instructions on behalf of plaintiff:

2. The jury are instructed that the calls for the Mississippi river in the deeds or conveyances read in evidence from one private individual to another private individual, do not give or create riparian rights.

3. The eastern boundary line of the corporation of St. Louis, of 1809, read in evidence, and the eastern line of the out-boundary of December 8, 1840, read in evidence, both extend to the eastern boundary of the State of Missouri, which is the middle of the main channel of the Mississippi river.

4. If the jury believe from the evidence that a street, or tow-path, or passway, or other open space, was permanently established for the public use between the Mississippi river and the most eastern row of lots or blocks (of which block 44 was one) in the former town of St. Louis when said town was first laid out, or established, or founded, then and in that case the owner or claimant of said lots or blocks are not riparian proprietors of the land between said lots or blocks and said river.

5. If the jury believe from the evidence that a street, or tow-path, or passway, or other open space, was permanently established for the use of the public between the Mississippi

river and the most eastern row of lots or blocks (of which block 44 was one) in the former town of St. Louis when the town was first laid out, or established, or founded, and that the river after that time washed away the land so that the western edge or bank thereof was west of said road, or tow-path, or pathway, or other open space, and west of the eastern boundary line of said lots or blocks, and that afterwards the river receded so that the present western edge or bank thereof is no further west than when said town was first laid out, established or founded, the owners of said lots are not entitled to riparian rights.

6. If the jury believe from the evidence that a street, or tow-path, or passway, or other space, was permanently established for the public use between the Mississippi river and the most eastern row of lots or blocks (of which block 44 was one) as said town existed prior to December 20, 1803, then and in that case the owners or claimants of said lots or blocks are not riparian proprietors of the lands between said lots or blocks and the said river.

Plaintiff also asked the court to give the following instructions to the jury, which the court refused to give :

1. If the jury believe from the evidence that block 44 in the former town of St. Louis was, by a United States survey, surrounded on all sides by streets, and that said survey has from the time of the recording and approving of the same stood as an approved survey without appeal, the owners of the lot in said block thus surrounded are estopped from claiming any ground beyond the street which is by said survey made its eastern boundary.

2. The jury will find for the plaintiff if they believe from the evidence that all of the maps, plats, surveys, deeds, and other documents and instruments read in evidence by the plaintiff are genuine ; and that the premises in controversy are not within the boundaries of any land confirmed to any person or persons, but are within the boundaries of the corporation of 1809, read in evidence, and within the out-boundary of

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December 8, 1840, read in evidence, and within the school assignment, being survey No. 400, read in evidence, and within the boundaries of the land described in the deed from the City of St. Louis to the plaintiff, read in evidence.

3. All streets, wharves, avenues, alleys, passways and other thoroughfares in towns and cities are presumed to have been established for the public use, and those who wish to show the contrary must prove it. If, therefore, the jury believe from the evidence that there was a street, tow-path, pathway, or other open space, in the former town of St. Louis, between the Mississippi river and the more eastern row of lots or blocks (of which block 44 was one), such street, tow-path or other space the jury will presume was established for the use of the public, and not affected, impaired or interfered with by riparian rights, unless the contrary be proved to their satisfaction.

4. If the jury believe from the evidence, that, in accordance with the plan of the former town of St. Louis, as the same was first laid out, established, or founded, there was between the most eastern row of blocks and the Mississippi river from Plum street to Hazel street, a space of ground left for a street, road, tow-path, or levee, dedicated to any other use common to the inhabitants thereof, or to the public use, then the lots in said blocks are not riparian, and not entitled to alluvion.

5. If the jury believe from the maps and plats, and all of the other evidence in the case, that the Spanish authorities intended to leave a space from Plum street to Hazel street in the former town of St. Louis, between the most eastern tier of blocks (of which block 44 is one) and the Mississippi river for a continuation of Main street, or Fourth street, or for any other public purpose, then the lots in said block have no riparian rights.

6. The jury are instructed to disregard all parol evidence tending to establish the boundary of a lot varying from that of other lots in the same tier, if they are satisfied from all

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the evidence in the cause that such uniformity was a part of the plan of the Spanish town of St. Louis.

7. The jury are instructed that, as a question of law, the owners of lots in the town of St. Louis, as said town existed prior to December 20, 1803, have never had any riparian rights.

8. If the jury believe from the evidence that the defendants claim under a confirmation, and that the survey of such confirmation does not call for the river as a boundary, they are stopped by said survey, and cannot claim any rights as riparian proprietors.

9. If both the confirmation and surveys of the United States to private individuals for the most eastern row of lots west of the premises in controversy do not call for the Mississippi river as a boundary, then the owners of said lots are not entitled to said premises as riparian proprietors.

10. If the jury believe from the evidence that prior to December 20, 1803, there was a road or passway between the front row of lots in the former town of St. Louis and the Mississippi river; and the river after that time washed away the land, so that the western edge or bank thereof was west of said road or passway, and west of the eastern boundary line of said lot; and that afterwards the river receded, so that the present western edge or bank thereof is no farther west than where it was prior to December 20, 1803, the owners of said lots are not entitled to riparian rights.

11. As the concession, confirmation and survey to Louis Ride or his representatives call for a permanent road on the east, neither the said Ride or his representatives nor any one claiming by, through or under him or them, can claim any riparian rights.

12. It is only the acts and proceedings of the Spanish Government which have been confirmed by the United States, or the acts and proceedings of the United States themselves, that can give or create riparian rights, or any other rights, in or to the land in dispute. No act or proceeding of the corpo-

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ration of the City of St. Louis, or of any private individual, can give or create any such right or rights.

13. The whole or any part of a Spanish concession which has not been confirmed by the United States, does not grant or convey any right, title or interest in or to any lands.

14. The defendant in this cause has set up no title in himself, or those whom he represents, or under whom he claims, but seeks to maintain his possession as a mere intruder by setting up title in third persons with whom he has no privity. In such a case, it is incumbent upon the party setting up the defence to establish the existence of such an outstanding title beyond all controversy. It is not sufficient for him to show that there may possibly be such a title; if he leaves it in doubt, that is enough for the plaintiff. Where the plaintiff has a *prima facie* good title, he has a right to depend on such title, and is not bound to furnish any evidence to assist the defence. It is not incumbent on him negatively to establish the non-existence of such an outstanding title, but it is the duty of the defendant to make its existence certain.

To the refusal of the court to give said last mentioned instructions, the plaintiff at the time excepted.

The court gave the following instructions to the jury at the request of the defendant, viz.:

1. If the jury find from the evidence that prior to and on the 20th December, 1803, Madame Charleville inhabited, cultivated and possessed a lot of ground in the town of St. Louis, being part of the present city block 44, and bounded on the west by the present Second street, on the north by the present Lombard street, on the east by the Mississippi river, and on the south by the north line of the lot of Leveille, which was parallel to said Lombard street; that said Madame Charleville claimed title to said lot, and she and those deriving title under her continued to inhabit, cultivate and possess said lot down to the 13th June, 1812; that river accretions have been made to said lot along its eastern line, and the premises sued for are a part of such accretions lying

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between the north and south lines of said lot extended to the river in its present position,—then the plaintiff cannot recover, and the jury must return a verdict for the defendant.

2. The circumstance that a passage-way or tow-path existed along the river bank will not affect the right of the parties, if the jury believe that the same was kept up at the charge and risk of the proprietor of the lot; that it followed the changes of the river going to the east or west as the river receded or encroached upon the lot, and that the eastern enclosure of the proprietor was advanced or set back with such changes.

3. If the jury believe from the evidence that the claim confirmed to and surveyed for the representatives of Louis Ride, as shown in evidence for the plaintiff, was another and different claim from that under which Madame Charleville inhabited, cultivated and possessed her lot in block 44, and that said lot claimed by and confirmed to the representatives of Ride was in truth locally situate in another and different block, then the jury ought wholly to reject the confirmation and survey for the representatives of Ride as being irrelevant to the matter in controversy in this suit.

To the giving of said instructions for the defendant the plaintiff excepted. The jury found a verdict for the defendant.

*James Taussig*, for appellants.

I. The receipts of the collector of State and county taxes, for taxes paid by Risley from 1837 to 1857 on his lot in block 44, were not competent and relevant testimony for the purpose for which they were offered, and ought to have been excluded.

The defendant expressly stated that he offered these receipts as evidence only of the boundary of his lot—*St. Louis v. Gorman*, 29 Mo. 593. Traditionary evidence is not admissible for the purpose of proving the boundary of a private estate—1 Greenl. Ev. § 145, note 1, and cases cited, and note 1 to p. 188; *id.* §§ 128-9, 131, 135-7.



II. The testimony of Thomas Marshall was incompetent and should have been excluded.—1 Greenl. Ev. § 440—see particularly end of section on p. 552, and notes 3 & 4; Davis v. Mason, 4 Pick. 156; Farrar v. Warfield, 8 Mart. (N. S.) 695-6.

III. The court ought to have declared as a matter of law that the Charleville lot was bounded on the east by a street, and therefore not entitled to riparian rights.

Where the boundaries of a lot are, is a matter of fact to be determined by the jury; but what constitute the boundaries of a lot, is a question of law to be decided by the court—Whittelsey v. Kellogg, 28 Mo. 404; Bell v. Dawson, 32 Mo. 79. The instructions given at the request of defendant should therefore have been refused—Smith v. City of St. Louis, 21 Mo. 36; Smith v. Pub. Schools, 30 Mo. 298.

IV. Admitting, for the sake of argument, that it was not a question of law, but a question of fact, whether the Charleville lot was bounded on the east by a street, it is submitted that the defendant, as a trespasser, was precluded from raising the question, and that the survey of block 44, made by the United States, was conclusive against him.

The defendant did not show or set up any title in himself; he was a mere trespasser, and was therefore not in a position to attack the plaintiff's title by attempting to show that the land covered by survey 400 was not vacant in 1803—Kissell v. Schools, 18 How. 18; Jones v. Soulard, 24 How. 40.

Instructions Nos. 1 and 2, refused, should have been given. Instruction No. 14 ought to have been given—6 Pet. p. 303.

V. The 1st, 3d, 4th, 5th and 10th of plaintiff's instructions, refused, contained a correct exposition of the law of riparian rights as declared by this court, and ought to have been given—Smith v. Pub. Schools, 30 Mo. 295; New Orleans v. United States, 10 Pet. 662; 4 Mart. 97; 6 Mart. 19. Cotton Press Cases—18 La. 122, 278, 286; 7 Mart. 626, n. 5; 9 Mart. 656.

*R. M. Field*, for respondents.

I. It was contended by the plaintiff, in the court below, that riparian rights did not attach to lots in the town of St. Louis.

The Supreme Court of this State passed on this precise question in the case of *Smith v. Pub. Schools*, 30 Mo. 301. If the river is the boundary of a town lot, it may be riparian just as much as a tract of land would be in the country.

The same question was decided in the Supreme Court of the United States, in *Jones v. Soulard*, 24 How. 41.

II. That tradition, reputation and hearsay are admissible in respect to the existence, character and extent of public rights, and in respect to the location and boundaries of things of a public nature, is received as a settled rule by all text-writers on the law of evidence.

The English cases make a distinction between public and private boundaries, holding that the latter cannot be proved by hearsay unless they are identical with a public boundary, in which last mentioned case hearsay is admissible—*Thomas v. Jenkins*, 6 Ad. & El. 525. In the present case, the dispute between the parties grew out of the existence of a road along the eastern line of the lot. According to the rule of the English courts, the character of this road might be ascertained by hearsay proof. But the American courts have been much more liberal, and have rejected the distinction above mentioned, holding that reputation and hearsay are always admissible on the subject of boundaries, whether public or private. The cases are collected and commented on by Judge Cowen in his edition of 1 Phill. Ev. 219, n. 87.

This case is not at all analagous to that of *St. Louis v. Gorman*, 29 Mo. 573, in which the party relied on tax receipts as passing the city title by estoppel. No such effect is claimed here. In cases involving the statute of limitations, tax receipts have always been admitted as evidence of the character and limits of the possession—*Williams v. Dongan*, 20 Mo. 186; *Menkens v. Ovenhouse*, 22 Mo. 71; *Draper v. Shoot*, 25 Mo. 197.

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By reference to the Pennsylvania cases, it will be seen that the courts of that State have decided that the payment of taxes may enlarge the limits of an adverse possession; so that if a trespasser enters upon a tract of land, and actually possesses only some small part, yet, by paying taxes on the whole for the time prescribed for limitation, he will acquire title to the entire tract—*Royer v. Benlow*, 10 S. & R. 304; *Reed v. Goodyear*, 17 S. & R. 350; *McCall v. Nealy*, 3 Watts, 73; *Sorber v. Willing*, 10 Watts, 141. Under this rule, it would seem that, in the case of *St. Louis v. Gorman*, *supra*, if the latter had continued to pay taxes for the whole period prescribed for limitation, he would have obtained a perfect title. And applying the same rule to the present case, it is manifest from the record that any right from the city was barred by the statute of limitations.

WAGNER, Judge, delivered the opinion of the court.

This was an action of ejectment, which resulted on the trial below in a verdict and judgment for respondents. The property, of which the title is drawn in question, is block 856 in the city of St. Louis, and lies between Hazel and Lombard streets, and east of the old city block 44. It is shown that, previously to 1844, the Mississippi river ran along the eastern border of block 44 and considerably west of the present Main street. After the great flood of 1844 accretions began to form, and in a few years the shore in front of block 44 had reached several hundred feet. This led to a new arrangement of streets. Main street, which had previously run no farther south than Plum street, was extended through the new-made land, with an enlarged width; Lombard and Hazel streets were prolonged to the new bank of the river, and in this way block 856 was formed.

The City of St. Louis originally claimed the ownership of the block in controversy, contending that the lots in block 44 did not extend to the river, but were separated from it by a street, passway, or open place, which belonged to the city, and attracted the accretions.

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The Board of Public Schools set up claim to ownership, under the reservation in its favor, by act of Congress of 1812, of all vacant lots, asserting that riparian rights did not attach to urban property, and that as the town of St. Louis extended to the middle of the river, and that as the bed of the river was not rightfully claimed at the date of the act by any private individual, it fell of course to the Public Schools. Before the commencement of this action the city conveyed to the Public Schools all its title to block 856.

The proprietors of block 44 (the respondent being one of them) also claimed the said block, insisting that their rights of property extended to the river, and the new-made land belonged to them as being a riparian accretion.

On the trial, the plaintiff, as proof of title, gave in evidence the record of the incorporation of the town of St. Louis, made by the Common Pleas Court in 1809; the outboundary survey of St. Louis, by the Surveyor-General, in 1840; the assignment of block 856 to the Board of Public Schools, by the Surveyor-General, in 1857, said survey numbered 400; act of Legislature, approved November 28, 1857, authorizing a compromise of conflicting claims between the city and the school board; the deed of the city conveying block 856 to the school board; and an act of the Legislature, approved March 3, 1851, in relation to swamp lands in Saint Louis county.

Plaintiff then introduced in evidence several maps and a large mass of documentary evidence, which is not sufficiently material to require being set forth here; and, among others, a concession to Louis Ride and a confirmation of the same, together with a survey of the same confirmation by the Surveyor-General. According to this survey, the claim was located in the northwest quarter of block 44, and extended eastwardly no farther than 150 feet. Also much testimony tending to prove (though slightly, we think) that the original grant or concession of block 44 was bounded on the east by a road which separated it from the Mississippi, and that it did not extend to the river.

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The defendant proved that the old city block 44, which lies immediately west of the block in controversy, was inhabited and cultivated for many years prior to December 20, 1803—one Leveille living on the south half, and Madame Charleville on the north half. The fact of such cultivation and inhabitation was fullen proven; the contest was in respect to the extent of the lots of Leveille and Charleville towards the east, the defendant insisting that they extended to, and were bounded by, the river; while the plaintiff contended that they ran no farther eastward than a public passway, or open space, that separated the lots from the river. This was the real controversy and the main issue of fact before the jury.

The defendant introduced a concession by the Spanish Governor, dated March 1, 1788, to the free negro Charles Leveille, for a lot in St. Louis of 60 by 150 feet, and described in the concession as follows: "bounded on the one side by the heirs of Louis Ride; on the other, by His Majesty's domain; on the rear, by the Mississippi [*por detras, al rio Mississippi*]; and on the main front, by the road which follows from the second main street to the Prairie-à-Catalan." The defendant also introduced a concession by Governor Manuel Perez to Augustin Amiot, dated September 2, 1788, of a lot in the southern part of St. Louis, described as follows in the concession: "120 feet front by 150 feet deep; bounded on the north side by the lot of the free negro called Charles, on the other side by the royal domain, on the rear by the Mississippi, and on its principal front by the royal road leading to the Prairie-à-Catalan."

Parol evidence was introduced by both parties, tending to show on the one side that in Spanish times the lots ran to the river; that there was never any street between the east end of the lots and the river; that the ends of the fence would sometimes have to be moved back on account of the abrasion or falling in of the river bank; the river, for some years prior to 1844, occasionally slightly receded from the east bank, in low water, but in consequence of high water in

1844 the ground afterwards made rapidly eastwardly; the accumulations were also caused by the materials used in constructing cross-streets out in the river.

On the other side, the parol evidence tended to prove that there was always a path or road (*sentier*) between the lots and the river in Spanish times, and that the road extended the whole length of the town; that the government always left a strip of land along the river for voyagers, but that the road along the river was repaired by the voluntary act of the people living along the road, and not by public authority or public taxes. Defendant gave in evidence a resolution of the board of aldermen of the City of St. Louis authorizing a survey and map of the city, and a lithographic copy of Paul's map of 1823, which was proved to be a true copy of the original made under such resolution. It was admitted that the field notes of the survey and the original map were lost. From this map it appeared that Main street extended, at the date of the map, no farther south than Plum street, and that the river covered all the eastern part of block 44.

Defendant then introduced the ordinance of the city passed in 1851, opening Main street south of Plum and through block 44, and proved that defendant, in conformity with the ordinance, relinquished the right of way; also a tax sale of the lot of Leveille for the city taxes of the year 1826. The certificate of sale and the assessment describe the lot as bounded east by the river.

Defendant then showed in evidence the tax receipts for defendant's property for the years 1837, 1838, 1839, 1845, 1846, 1847, 1848, 1849, 1853, 1854, 1855, 1856, 1857. From these receipts, it appears that up to 1853 the defendant was taxed for a lot in block 44 as bounded on the east by the river. The depth of the lot is described as increasing from 150 feet in 1837 to 800 feet in 1854. In 1854, and following years, the defendant was taxed for the property in dispute as lying between Main and Front streets. Defendant also showed that he had been assessed by the city, and had paid in 1854 a tax on the property in question for opening



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streets, and then introduced a map of Risley's addition, recorded in 1855.

Defendant then introduced Thomas Marshall as a witness, who testified that he was an examiner of titles; that he had examined almost all titles to lands in the city of St. Louis, and who gave it as his conclusion that the land of Ride was north of Elm street. Also read in evidence the deed of Tayon to Papin in 1832, in which the lot is described as bounded eastwardly by the Mississippi river, or street if any there be; also the deed of Papin to Stearnes and Risley, containing the same boundaries; also the deed of Stearnes to Risley in 1836, with the same boundaries.

There was much other testimony on both sides, but the above constitutes essentially the controlling parts, and the balance was merely auxiliary or cumulative.

Several objections were taken on the trial to the admissibility of evidence on the part of the appellant, but the objections were mostly of a general character, without specifying any particular reasons against the admission; and where such is the case, this court has held that it will not look into the question to see or conjecture on what grounds the evidence was objectionable. Evidence may be admissible for one thing in the course of a trial, when it would be wholly excluded for another, and it is the duty of a party objecting to state specifically his reasons therefor. It is insisted that the court erred in receiving the receipts of the collector of State and county taxes paid by Risley from 1837 to 1857 on his lot in block 44, and that the case of *St. Louis v. Gorman*, 29 Mo. 593, is an authority directly against the admission of the evidence. But the cases are not analagous. In *Gorman's* case, the party relied on tax receipts as passing the title of the city by estoppel. It clearly appeared there that the officers of the corporation, without any authority, assessed the property of the corporation against a person for taxation, and returned the same as delinquent for non-payment of taxes, bought it at the tax sale, and conveyed it upon redemption; and this was held not to estop the city

from claiming its property against the unauthorized acts of its officers. But no such state of facts were set up in this case. The payment of taxes, singly and by itself, would amount to very slight evidence; but in some circumstances such payment is a fact which may be submitted to the jury, and be weighed by them in making their verdict.

Payment of taxes has been admitted in questions of adverse possession, and may have an important bearing, as it is not usual for one owning realty to neglect paying taxes for a period which would be sufficient to constitute a bar under the statute of limitations, or for one to pay taxes having no claim or color of title.

The party here, however, was in possession, and the evidence was introduced ostensibly for the purpose of defining the boundaries. We think the evidence was properly allowed to go to the jury as a circumstance to show what was the understanding of the parties as to the lines and boundaries of the lot. As to the testimony of Marshall, it is clear that his opinion was not admissible; there is certainly nothing in the law of evidence which would make the opinion of an examiner of titles evidence of location in case of conflicting and doubtful lines. A practical surveyor may express his opinion whether the marks on trees, piles of stones, &c., were intended as monuments of boundaries; but he cannot express an opinion that, from the objects and appearances which he saw on the ground, the tract he surveyed was identical with the tract marked on a certain diagram—1 Greenl. Ev. 440.

But granting that the evidence was entirely incompetent, when the other proofs are considered together with the original concession we do not see that the appellant was injured by it.

It is objected that the deeds of Papin and Stearnes were not admissible to show title in the respondent because they were offered and read in reply to the rebutting testimony of the appellant. Although the respondent had rested, and these deeds were necessary to show his derivative title, yet

the introduction of testimony out of its regular order, or after a party has closed his case, when he has omitted a material link through inadvertence, is a matter resting in the sound discretion of the court below, and will not be reviewed here.

In the present case, the dispute between the parties grew out of the existence of a road along the eastern line of the lot. The law seems to be well settled, that tradition, reputation and hearsay are admissible to prove the extent, character and existence of public rights as regards the location and boundaries of things of a public nature. The only conflict here being as to whether the eastern line of the lot was bounded on a public highway, it follows that it falls fully within the rules admitting hearsay, reputation and tradition. But it is needless and supererogatory to examine with particularity and detail all the questions that have been raised in argument. The only important point in the whole case turns on the question as to whether the proprietors of the lots are entitled to riparian privileges. This question has been considered twice before in this court, and once in the Supreme Court of the United States, and must be considered as settled as *res adjudicata*, and no longer a subject for discussion.

In the case of *Jones v. Soulard*, 24 How. (U. S.) 41, it is expressly decided that the calls for the eastern line of the boundary of St. Louis, in the incorporation of 1809, make the city a riparian proprietor upon the Mississippi, and as such entitled it to all accretions as far as the middle thread of the stream. In *Smith v. Public Schools*, 30 Mo. 301, it is held that if the river is the boundary of a town lot, it may be riparian just as much as a tract of land would be in the country; and the question is again examined, affirmed and approved in *LeBeau v. Gaven*, 37 Mo. 556. That the calls and descriptions contained in the original concession to Leveille called for the bank of the Mississippi as its eastern boundary, cannot be for a moment gainsayed or doubted.

Whatever evidence there was bearing on the subject was

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given to the jury under instructions of the most favorable character for the appellant.

We have been unable to detect any error in the action of the court in either giving or refusing instructions, and we accordingly order its judgment to be affirmed.

The other judges concur.

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THE BOARD OF PRESIDENT AND DIRECTORS OF THE ST. LOUIS PUBLIC SCHOOLS, Appellant, v. MARY FRITZ and CHARLES FRITZ her husband, and GEORGE BAYHA, Administrator of GOTTFRIED SCHOENTHALER, deceased, Respondents.

*Lands and Land Titles — Confirmations — Public Officers — Surveyor.*—The act of Congress of June 13, 1812, was by its terms a direct grant of lands to all persons who could show that they came within the provisions of this first section, and no public officer could in any way impair that right by any subsequent action.

*Appeal from St. Louis Circuit Court.*

This was an action of ejectment. The plaintiff's evidence was the same as in the Risley case.

The defendants read in evidence a concession to Charles Leveille (or Leveiller), dated 1st of March, 1788, by which Manuel Perez, Lieut. Governor, upon the petition of Charles Leveille, a free negro, who had been the slave of the late Louis Robert, conceded to the said Charles Leveille, his heirs and assigns, in fee simple, "a lot of ground sixty feet front only, by one hundred and fifty feet deep, situated in this town of St. Louis, bounded on one side by the lot of Louis Ride's heirs, on the other by the king's domain, on its rear by the Mississippi river, and on its principal front by the road which leads from Second street to Prairie-à-Catalan," under the condition, &c.

The defendants then proved by the testimony of Madame Papin, Jean Pourcelli, Jacques L'Abbé, J. B. Hortiz, P. D. Barada, David Adams, and R. Dowling, that prior to the

change of government the said Charles Leveille (or Levelier) and his wife lived on the lot described; that the southern boundary of it was what is now known as Hazel street; the western boundary, the continuation of Second street, then a road leading to Carondelet (Prairie-à-Catalan); the northern boundary, the lot of Louis Ride's heirs; and the eastern boundary, the river Mississippi. That there were, before 1800, large fruit trees on the lot, some as thick as a man's body. The house was then old; the fence was along the Second street front and the Hazel street front, and extended eastward to the river bank, which was then within 150 feet of where Second street is now; that the river ran deep between the present location of Main street and Second street; that the bank of the river was steep; that the eastern fence of Leveille ran along the top of it, and that sometimes the river carried away the bank, and the fence had to be moved back. There was no street or road east of Leveille's lot; there was sometimes a path, but it was very difficult for a person on foot to get along that path when the water was high; he had to hold on to the fence to save himself from falling into the water.

Charles Leveille and his wife lived on this lot until the death of the old man, which occurred in 1809 or 1810. His widow lived on it until her death in 1826, or thereabouts; she sold part of it to a person named Longtin. Schoenthaler subsequently got possession by purchase of the northern half of this lot, and continued to occupy it for many years up to his death. After 1844 the river changed its course; a great filling up took place from Plum street southward, and the river receded several hundred feet to the eastward. What was called Duncan's Island lay nearly opposite this lot. The main channel of the river used to run west of Duncan's Island; now, Duncan's Island is west of the new levee or Front street. Main street, as now established, was laid out in 1853-4; old Main street was much farther westward.

In Spanish times, and up to 1844, Main street did not run below Plum street. If you had continued the street farther

below Plum street, you would have run into the river. Plum street is the street south of Poplar; then comes Cedar, then Mulberry, then Lombard, and then Hazel. All these names, and the streets themselves for the most part, are modern. There was a rocky shore from Plum street northward to Cherry street; there was no rock on the western bank south of Plum. There was no street in Spanish times where Hazel street now is, nor was there any cross street south of it. The continuation of Second street southward went over the bridge across Mill creek; it ran very nearly as Second street now runs. The bridge was the only place where you could cross Mill creek in those days.

The plaintiff, in rebuttal, called Charles Sanguinette, who testified that he was 80 years old. He formerly resided in the southern part of the town of St. Louis. There was a road along the top of the bank of the river in front of the town in Spanish times, about 15 or 16 feet wide—not less than that: this road ran between the east part of Leveille's lot and the river. On cross-examination, he said that this road crossed Mill creek at the bridge on the road to Carondelet; that Main street came down below Leveille, and that at some distance above Leveille it ran into the river; that from that point to the lower end of the town it was only a road 15 or 16 feet wide; thinks Main street passed east of Leveille at the time of the change of government.

Plaintiff read the deposition of William Boly, who testified that he was born in 1785; lived in St. Louis in Spanish times; there were but few houses in the southern part of the city then. During Spanish times Main street ran to Baptiste Lebeau's, and below that it was a tow-path about 25 feet wide to Mill creek. On cross-examination, he said that the hands of the boats used to walk along the front of the lower part of the town to warp up their boats. If the water was low, they walked under the bank; if it was high, they walked on top of the bank. Did not know whether any one but boat hands used this road; supposed they might have done so.



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Plaintiff then read the following papers :

1. Chouteau's plat of the old town of St. Louis, certified by the U. S. Recorder of land titles to be a copy of the original on file in his office.
2. The plat of the town of St. Louis compiled by Surveyor-General Conway in 1846, March 12.
3. A plat of the town of St. Louis by James M. Loughborough, certified April 14, 1859.
4. Plat of township 45 north, of range 7 east, of St. Louis county.

Also, certified copies of plats of blocks 43, 44 and 45 of the town of St. Louis, made in 1835.

Also, a certified copy of a survey, made in 1855, of a confirmation of  $60 \times 150$  feet to Charles Leveille; this was numbered 394. It covered  $64\frac{4}{12}$  feet on Second street, and ran east 150 feet French measure, or  $160\frac{5}{12}$  feet English measure.

The plaintiff then read a concession, confirmation and survey of land to Louis Ride, lying north of Leveille's lot.

The defendants objected to all these papers for irrelevancy, but the court admitted them.

Plaintiff then read a deed from the widow of Leveille (or Levellier), dated 24th of February, 1825, conveying to Pierre Longtin a certain lot or parcel of land in the city of St. Louis, containing 30 feet front on the Mississippi river by 120 feet in depth running westwardly : "bounded on the east by a road separating it from the Mississippi, north by Francis Tayon, on the west and south by land or lots reserved by me, which land belongs to me as appears by a concession of a larger quantity in Livre Terrain."

The plaintiff then read a list of lands certified from the office of the Recorder of land titles. This was objected to by defendants.

Defendants recalled David Adams and Richard Dowling to contradict the testimony of Sanguinette and Boly.

The court at the request of plaintiff gave the following instructions:

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1. The eastern boundary line of the corporation of St. Louis of 1809, read in evidence, and the eastern line of the outboundary of December 8, 1840, read in evidence, both extend to the eastern boundary of the State of Missouri, which is in the middle of the main channel of the Mississippi river.

2. The defendant in this case has set up no title in himself or those whom he represents, or under whom he claims, but seeks to maintain his possession, as a mere intruder, by setting up a title in a third person, with whom he has no privity. In such a case, it is incumbent upon the party setting up the defence to establish the existence of such an outstanding title beyond all controversy. It is not sufficient for him to show that there may be possibly such a title. If he leaves it in doubt, that is enough for the plaintiff. Where a plaintiff has a *prima facie* good title, he has a right to rely on such title, and is not bound to furnish any evidence to assist the defence. It is not incumbent on him negatively to establish the non-existence of such an outstanding title, but it is the duty of the defendant to make its existence certain.

At the request of the defendants, the court gave the following instructions, plaintiff excepting thereto :

1. The jury is instructed that if they believe from the evidence, that, prior to and on the 20th December, 1803, a person named Leveille inhabited, cultivated and possessed a lot of ground in the town of St. Louis, bounded west by Second street, on the east by the river Mississippi, on the south by a line parallel to Hazel street and near to it, and on the north by another parallel line, sixty feet distant from the first parallel ; that Leveille claimed this lot as his own ; that he continued on the same lot until his death, which occurred before 1812, but that his widow, claiming the same under him, continued to reside there until after 1812 ; that the west or right bank of the river was then nearer to Second street than it now is ; that the premises in controversy are

included within Second street on the west, the Mississippi on the east, and the north and south lines of Leveille's possession extended to the bank of the river in its new position, then the plaintiff cannot recover, and the jury must find for the defendants.

2. The jury is further instructed that if they find from the evidence that there was, for the convenience of those who occupied the lot of Leveille and the adjoining neighbors and others, a road left along the front of it, between it and the river, and that when the river receded this road was removed further east, and when the river rose it was extended further west; and that the same was the case with the enclosure of Leveille; there is no presumption thence arising against the ownership by Leveille and those claiming under him, up to the middle of the main channel of the river, subject to the easement of the public to use the river as a highway, and to cordel the boats used in navigating it by means of the road above spoken of.

3. The jury is instructed that the concession to Leveille read in evidence, dated 1st of March, 1788, is evidence of the extent of his claim to the ground therein described, and evidence that he claimed to the Mississippi river.

4. The jury is further instructed that the first section of the act of 1812 confirmed the titles of the inhabitants of the town of St. Louis to lots inhabited, cultivated or possessed by them on the 20th of December, 1803, according to their claims thereto.

5. The jury is further instructed that nothing done by any officer of the United States subsequently to the 13th of June, 1812, has any effect to limit or impair any rights accruing to any individual under that act.

The court refused the following instructions, plaintiff excepting:

1. If the jury believe from the evidence that in accordance with the plan of the town of St. Louis, as laid out in 1764,

there was between the front row of lots and the river a space of ground left for a street, road, or tow-path, or levee, or dedicated to any other use common to the inhabitants thereof or the public, then said lots are not riparian, and not entitled to alluvion.

2. The jury are instructed to disregard all parol evidence tending to establish a boundary of a lot varying from that of other lots of the same tier, if they are satisfied from all the evidence in the cause that such uniformity was a part of the plan of the Spanish town of St. Louis.

3. If the jury believe that block 44, to which the land in controversy is claimed as an accession through alluvion, was by the United States surveys, in 1835, surrounded on all sides by streets, and said surveys have stood from that time to the present as the approved surveys of the town, without appeal, the owners of the lots then surveyed are estopped from claiming any ground beyond the street which is by such surveys made its eastern boundary.

4. The call for the river as the eastern boundary of the lot of Leveille, in the original concession of the Lieut. Governor, is not conclusive evidence that the lot is riparian; but if the jury believe from the maps and plats in evidence, and all the evidence in the case, that the Spanish authorities intended to leave a space between the tier of lots of which block 44 is one, and the river, for continuation of Main street or Front street, or for any other public purpose, said call will be disregarded.

5. If the jury believe from the evidence that prior to December 20, 1803, there was a road or passway between the front row of the lots in the former town of St. Louis and the Mississippi river, and that the river after that time washed away the land so that the western edge or bank thereof was west of said road or passway, and west of the eastern boundary line of said lots, and that afterwards the river receded so that the present western edge or bank thereof is no farther

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west than where it was prior to December 20, 1803, the owners of said lots are not entitled to riparian rights.

6. The jury will find for the plaintiff, if they believe from the evidence that all the maps, plats, surveys, deeds, and other documents and instruments read in evidence by the plaintiff are genuine, and that the premises in controversy are within the boundaries of the corporation of 1809, read in evidence, and within the outboundary of December 8, 1840, read in evidence, and also within the School assignment, being survey 400, read in evidence; and that the land described in the deed from the City of St. Louis to the plaintiff, read in evidence, includes the land that is described in the petition of the plaintiff, and also that the land described in the petition is not within the boundaries of any land confirmed to any person or persons.

7. If the jury believe from the evidence that the defendants claim under a confirmation, and that the survey of that confirmation does not call for the river as a boundary, they are estopped by that survey, and cannot claim any rights as riparian proprietors.

8. The jury are instructed that, as a question of law, the owners of lots in the town of St. Louis, as said town existed prior to December 20, 1803, have never had any riparian rights.

9. If both the confirmation and the surveys of the United States to private individuals, for the most eastern row of lots west of the premises in controversy, do not call for the Mississippi river as a boundary, then the owners of said lots are not entitled to said premises as riparian proprietors.

10. If the jury believe from the evidence that there was a street or tow-path, or passway, for the use of the public, between the Mississippi river and the most eastern row of lots in the former town of St. Louis, as said town existed prior to December 20, 1803, then and in that case the owners or claimants of said lots are not riparian proprietors of the lands between said lots and the said river.

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*Taussig*, for respondents.

I. The court improperly permitted to be used in evidence the receipt purporting to be signed by Francis Molair, city marshal.

II. The plaintiff by its proof established a *prima facie* title, and was entitled to recover, unless the defendants succeeded in convincing the jury that the land in controversy was confirmed to another person.

The eighth instruction asked by plaintiff should have been given—*Kissel v. Schools*, 18 How. 25; *Soulard v. Jones*, 24 How. 41.

III. The first, second, third, fourth, sixth and seventh instructions asked by plaintiff, and refused, are correct declarations of the law regulating riparian rights as declared by this court—*Smith v. Pub. Schools*, 30 Mo. 295, and cases cited in my brief in *Pub. Schools v. Risley's Heirs* (*ante* p. 362-3).

The refusal of the court to grant any of these instructions deprived the plaintiff of the benefit of all the testimony introduced by it to show the existence of a street or tow-path at the eastern boundary line of the river lots—*Morgan v. Livingston*, 6 Mart. 225; *Cochran v. Fort*, 7 Mart. (N. S.) 626; *Cotton Press Cas.* 18 La.; *Livingston v. Hermann*, 9 Mart. 656; *Packwood v. Wolden*, 7 Mart. (N. S.) 88; *U. S. v. New Orleans*, 10 Pet. 662.

Where a confirming act does not provide for a survey, and the boundaries of the land confirmed are defined by a Spanish survey or otherwise, no survey is necessary; but if a survey is required by the confirming act, or is necessary because of the absence of definite boundaries, it becomes binding between the confirmer and the Government.—See Act creating Surv.-Gen.'s Office, 3 U. S. Stat. 325; *West v. Cochran*, 17 How. 412-17; *Magwire v. Tyler*, 1 Black. 198; *Dent v. Sigerson*, 29 Mo. 489; *Cutter v. Waddingham*, 33 Mo. 282; *Burgess v. Gray*, 16 How. 48, 65.



*Gantt*, for respondents.

The respondents submit that the following propositions of facts are established by the record, viz. :

1. That the original concession to Leveille embraced a piece of land bounded west by Second street, or the road which was its continuation, east by the river Mississippi, south by land on which Hazel street was afterwards laid out, and north by land of Louis Ride's heirs.

2. That Leveille and his wife took possession of this lot, built upon it, laid out a garden and orchard, and in 1803, and for a long time previous, inhabited, cultivated and possessed the same, up to the limits and boundaries above indicated, claiming title thereto as proprietors.

3. That there was no street east of Second street, south of Plum street, for many years after the acquisition of Louisiana.

4. That in 1800, and for more than twenty years afterwards, the distance from Second street to the river, below Plum street, was much less than it is now ; that it was then not more than one hundred and fifty or two hundred feet at most ; that the lots below Plum street, fronting on Second street, extended eastwardly to the river ; and that this was emphatically true of the lot inhabited, possessed and cultivated by Leveille.

If these propositions of fact be established, it will result as a conclusion of law that this lot extended to the middle of the main channel of the stream, and that upon any receding of the river, leaving a part of this space dry, or reclaimable, the right of Leveille to the ground thus reclaimed became absolute ; that is, free from the easement of navigation, etc., which the public enjoyed in respect of this part of his lot when it was covered by water capable of floating boats—*Jones v. Soulard*, 24 How. 41 ; *Le Beau v. Gaven*, 37 Mo. p. 556.

WAGNER, Judge, delivered the opinion of the court.

This was an action of ejectment commenced by the appel-

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lant against the respondents to recover a lot of ground in the city of St. Louis. There was a trial before a jury and a verdict for the respondents. The evidence adduced by the appellant was substantially the same as in the case of the same plaintiff v. Risley's Heirs, decided at this term (*ante* p. 356).

An attempt is made to distinguish this case from Risley's by showing a confirmation and survey of the premises by United States officers subsequent to 1812, and assigning different calls for the boundaries of the lot to Leveille from those shown in the original concession and proved by the witness. The act of June 13, 1812, confirmed the title to all those who inhabited, cultivated and possessed lots prior to 1803, and amounted to a complete investiture and muniment of title immediately on the passage of the act, and it was not competent for any officer to in anywise impair that title by any action posterior to the passage of the law. We will not entertain the objection urged against the admission of the receipt of Molair, the city collector. The only exception that is made to it here is, that there was no proof offered of its execution. The objection was not made specifically in the court below, and if it had been, it could have been easily obviated when the witness was on the stand giving in his testimony. This court will give no encouragement to a course of practice which would enable a party to reap an advantage, when he himself has led his antagonist into an error or omission.

We cannot see on what principle the appellant can complain in regard to the outstanding title, when the court gave the very instruction that it asked, and which is certainly sufficiently favorable to it. The respondents might feel aggrieved at the instruction, but surely the appellant cannot.

The other questions arising on the record have been already discussed and decided at this term in the case of the Schools v. Risley, which must also determine this.

Judgment affirmed. The other judges concur.

THE BOARD OF PRESIDENT AND DIRECTORS OF THE ST. LOUIS  
PUBLIC SCHOOLS, Plaintiff in Error, v. ISAAC WALKER and  
PATRICK RYAN, Defendants in Error.

1. *Lands and Land Titles—Reservation—Confirmations—School Lands—Patents.*—An inchoate claim to land duly located and presented to the Board of Commissioners under the acts of Congress of 1805 and 1807, and afterwards confirmed by the act of July 4, 1836, was excepted out of the reservation made for schools by the act of Congress of June 13, 1812, and was not granted by the act of June 27, 1831. After the claim has been surveyed under the confirmation, the Surveyor-General cannot survey and set apart the same land to the use of schools.
2. *Lands and Land Titles—Confirmations—Patents—Relation.*—As between the parties, a confirmation by the act of July 4, 1836, relates back to the date of the filing of the claim with the first Board of Commissioners, where the claim had a definite location; but where land confirmed by the act of July 4, 1836, had been previously sold and patented by the United States, as between the patentee and the confirmee the confirmation has no relation backward.
3. *Lands and Land Titles—School Lands—Entry—Sale and Patent—Ejectment—Outstanding Title.*—A party in possession of land under an entry, sale, and patent issued in 1826, may, against the claim of the St. Louis Public Schools under the acts of June 13, 1812, and January 27, 1831, set up as an outstanding title a claim and confirmation by virtue of the act of July 4, 1836. The confirmee, although by the terms of the act he cannot recover the land as against the patentee, still has a right to locate other lands in lieu of those sold, and his title is not absolutely void.

*Error to St. Louis Land Court.*

This was an action brought by plaintiff against the defendants at the March term, 1864, in the St. Louis Land Court, to recover a tract of land containing about thirteen acres in the southern part of the city of St. Louis.

To establish its title, the plaintiff gave in evidence the act of incorporation of the town of St. Louis, dated November 9, 1809; a survey of the outboundary line of the town of St. Louis, commonly known as map X; the act incorporating the plaintiff, and assignment and survey of the premises in controversy by the Surveyor-General to the plaintiff, made in 1861, being survey No. 407 for the St. Louis Public Schools. And the plaintiff proved further that the land in controversy

was within the limits of the survey of the outboundary line of the town of St. Louis, and that it was within the limits of the line of the corporation of the town of St. Louis as established by order of the St. Louis Common Pleas Court of November 9, 1809.

It was admitted at the trial that the defendants were in possession of the land at the time of the commencement of this action.

The defendants gave in evidence a patent from the United States to Joseph Papin, dated June 15, 1826; also a deed for the land described in the patent from Joseph Papin to Larkin Deaver, and a deed for the same premises to Isaac Walker, the defendant. The defendants also gave evidence tending to show that they had been in possession of the premises sued for more than twenty years before the commencement of this suit. The defendants also gave in evidence, as an outstanding title, the following documents:

1. A petition, dated November 19, 1799, of Joseph Brazeau to Delassus, the Spanish Lieut. Governor of St. Louis, praying for a grant of a tract of land, embracing the premises in controversy, as an addition to his farm.

2. A concession by Delassus of the land described in the petition, order of survey, and a survey made by the Surveyor of the Spanish Government.

3. Proceedings had on the 19th day of July, 1806, before the first Board of Commissioners created to adjust and confirm the claims of the inhabitants of St. Louis to lands therein. Joseph Brazeau presented the concession of Delassus and the Spanish survey, and asked a confirmation of his claim, which was rejected as "being unsupported by actual inhabitation and cultivation, and interfering with a tract of land claimed by the inhabitants of St. Louis as commons."

4. Proceedings had on the 19th of August, 1811, before the Board. Joseph Brazeau presented his claim for confirmation, which was again rejected.

5. Proceedings had on the 14th of March, 1833, before the Board of Commissioners, created by the act of Congress of

July 9, 1832. Brazeau presented his concession, survey, and proof. On November 11, 1833, the Commissioners decided that his claim ought to be confirmed.

6. U. S. survey No. 3,078, in favor of Joseph Brazeau or his legal representatives, made in May, 1857, in pursuance of the act of Congress of July 4, 1836. The boundary lines of this survey embraced the land in controversy, but the certificate of the Surveyor-General, attached to the survey, expressly excludes from it the land in controversy, as land "sold or disposed of by the United States prior to the 4th day of July, 1836," and the certificate states that for the land thus excluded a certificate of new location was issued.

The defendants rested, and the plaintiff, in rebuttal, gave in evidence :

1. A certified copy of the certificate of re-location issued to Joseph Brazeau for the land excluded from survey 3,078.

2. The certificate of the Register of the Land Office at St. Louis, of the entry made by Joseph Papin of the land covered by his patent. The certificate is dated April 28, 1826.

3. An act of Congress for the relief of Phineas Underwood, approved May 22, 1826, the 2d section of which reads as follows : "*And be it further enacted*, That the time for filing petitions, under the provisions of an act entitled 'An act enabling the claimants to lands within the limits of the State of Missouri and Territory of Arkansas to institute proceedings to try the validity of their claims,' shall be and the same is hereby extended to the twenty-sixth day of May, in the year one thousand eight hundred and twenty-eight."

4. A series of letters of the Commissioner of the General Land Office to the Surveyor-General at St. Louis, showing the practice and rules of the Department, and parol testimony, which, under the ruling of the court, has no bearing on the case here presented.

It was then admitted by the defendants, that the assignment given in evidence by plaintiff and survey No. 407 had been approved and recorded by the Surveyor-General in his

office, and that no appeal was taken from his action by any of the parties interested.

The plaintiff then closed, and asked the following instructions:

1. The papers, documents and oral proof produced by plaintiff are *prima facie* evidence that the land in controversy has been legally surveyed, designated and set apart to the town (now city) of St. Louis for the support of schools therein.

2. The court, sitting as a jury, will find for the plaintiff if the court believes that the documents, papers, plats and surveys, given in evidence, are genuine; that the oral testimony offered by plaintiff is true, and that the land in controversy is within the boundaries of the corporation of 1809, within the outboundary of December 8, 1840, and also within School assignment and survey No. 407, read in evidence.

3. If the land embraced within Papin's patent is within the limits of the outboundary survey given in evidence by plaintiff, it was reserved from sale and entry, and the patent is void, although at the time of the entry and the issuing of the patent the land had not been designated and set apart to the town of St. Louis for the support of schools therein.

4. If the land embraced within the entry and patent of Papin, under which defendants claim, lies wholly within the outboundary of St. Louis as established under the authority of the United States pursuant to the first section of the act of June 13, 1812; and if said land lies wholly within the limits of the assignment and survey No. 407, given in evidence by plaintiff, and if such assignment and survey is a genuine document, then the entry of, and patent to, Papin were illegal and void, and no title passed by said entry and patent.

5. The assignment of land and survey No. 407 for the Public Schools, given in evidence by plaintiff, creates a better title than, and must prevail over, any title derived from the patent issued to Papin in the year 1826, given in evidence by defendants.



6. There is no evidence in the cause tending to show that Brazeau's concession for 12 by 30 arpents was confirmed by operation of the act of Congress of June 13, 1812.

7. There is no evidence in the cause tending to show that the land in controversy was, on the 13th of June, 1812, "rightfully owned or claimed" by Brazeau or his legal representatives within the meaning of the act of Congress of June 13, 1812.

8. The concessions by Delassus to Brazeau and the survey by Soulard, given in evidence by the defendants, do not prove a "rightful ownership or claim" in Brazeau or his legal representatives to the land in controversy within the meaning of the second section of the act of June 13, 1812. To constitute such "rightful ownership or claim" there must be proof of cultivation, possession or inhabitation prior to December 20, 1803, by Brazeau or those under whom he claimed. And, in the absence of such proof in this case, the defendants have failed to show that the land in controversy was "rightfully owned or claimed" on the 13th day of June, 1812, within the meaning of the second section of the act of June 13, 1812.

9. The concession and order of survey made to Joseph Brazeau by Delassus in 1799, and the survey made in pursuance thereof by Soulard, as given in evidence by defendants, vested no title in Brazeau to the property so surveyed for him.

10. If the land in controversy was surveyed and sold to Papin by the United States prior to July 4, 1836, it was not confirmed to Brazeau by the act of July 4, 1836, although such survey and sale to Papin was not made in conformity with any law of the United States, and although such survey and sale were void as against the title set up by plaintiff.

11. Brazeau's survey having been recommended for confirmation by the Board of Commissioners "according to the concession" and not "according to survey," the survey by Soulard is not conclusive evidence of the extent of said confirmation, and the Government is not precluded by said

survey; and survey No. 3,078, given in evidence by defendants, determines the right of the confirmee and of the defendants in claiming an outstanding title in Brazeau's representatives.

12. Survey 3,078 as approved by the Surveyor-General, given in evidence by defendants, is conclusive and binding on defendants as to the boundaries and quantity of land confirmed; and if the land in controversy is within one of the reservations enumerated in said survey and the certificate thereof, then the confirmation does not embrace the land so enumerated as reserved.

13. The designation of land and survey No. 407 for the Public Schools, given in evidence by plaintiff, creates a better title than, and must prevail over, the title of Brazeau and his representatives, emanating under the act of July 4, 1836, as given in evidence by defendants.

14. If the land in controversy is within the limits of the outboundary and assignment given in evidence by plaintiff, then plaintiff is entitled to recover in the absence of proof of inhabitation, cultivation and possession of the land in controversy prior to December 20, 1803, or of a confirmation of the same under any act of Congress passed prior to the 13th June, 1812.

15. The court declares the law to be, that, although it may appear from the evidence that the defendant Walker, and those deriving title under him, have had exclusive adverse possession, under a claim of ownership, since 1840, of the land sued for; and although it may further appear that the land in controversy has been since 1830 a tract of land within specific boundaries and known location,—these facts, if found, do not constitute a valid defence under the statute of limitations, if it appears in evidence that the land in controversy was surveyed, designated and set apart to the town of St. Louis, for the use of the schools therein, within ten years before the commencement of this action.

16. If the court believes from the evidence that all the plats, documents, papers and other instruments read in evi-

dence by the parties respectively are genuine ; that the oral testimony given in the cause is true ; that the premises in controversy are within the boundaries of the outboundary survey of December 8, 1840, within the boundaries of the corporation of St. Louis as created on the 9th of November, 1809, and within the boundaries of the assignment to the plaintiff evidenced by survey No. 407,—the court will find for the plaintiff, although the court may also find that the land in controversy is within the boundaries of the patent from the United States to Joseph Papin, and within the boundaries of the U. S. survey No. 3,078.

17. Although the court may believe from the evidence that the land in controversy is embraced in the confirmation to Joseph Brazeau under the act of July 4, 1836 ; and although the court may believe that the claim so confirmed was presented for investigation thereof to the Board of Commissioners appointed by the act of Congress approved March 2, 1805, and was considered by said board, the court will still find for plaintiff if it appear from the evidence that the claim so presented was rejected by the board.

18. The proceedings of the late Board of Commissioners under the act of 1805, and the proceedings of the late Board of Commissioners under the acts of July 9, 1832, and March 2, 1833, recommending Brazeau's claim for confirmation, and the act of July 4, 1836, are not evidence that the land embraced in Brazeau's concession was rightfully owned or claimed by Brazeau or his representatives within the meaning of the act of June 13, 1812.

All of which instructions the court refused to give, to which action of the court plaintiff excepted.

The defendant then asked the following instructions :

1. If the court believes from the evidence that the land in controversy is embraced in the land confirmed to Joseph Brazeau by act of Congress of July 4, 1836, given in evidence, and that the claim to the land so confirmed was presented for the investigation thereof to the Board of Commis-

sioners appointed by the act of Congress approved March 2, 1805, given in evidence, and was considered by said board, then the court shall find for the defendants.

2. If the court believes from the evidence that the land in controversy is embraced in the patent to Papin given in evidence, and that said patent is genuine, then the court should find for the defendants.

The court refused to give said instructions for the defendants, and of its own motion gave the following :

"The papers, documents and oral proof exhibited on the part of the plaintiff are *prima facie* evidence of the title in the plaintiff; but if the land in controversy is embraced in the tract of land claimed by Joseph Brazeau as conceded to him by Charles Dehault Delassus in 1799, and if Joseph Brazeau presented the said claim, embracing the land in question, for investigation to the Board of Commissioners appointed by the act of Congress approved March 2, 1805, and if said claim was confirmed to said Brazeau by the act of Congress passed July 4, 1836, the plaintiff cannot recover in this suit; and the fact that the United States conveyed the same to Joseph Papin in 1826 can make no difference, although the title so conveyed to said Papin may be held to be a better title than that of Brazeau under the act of 1836."

To the giving of which instruction the plaintiff excepted. The court gave judgment for defendants.

*Taussig*, for plaintiff in error.

I. The documentary and oral proof exhibited by plaintiff are *prima facie* evidence of title in plaintiff.

To overthrow the *prima facie* case thus made by appellant, the respondents gave in evidence the Papin patent and the concession, confirmation and survey for Joseph Brazeau's representatives; and the inquiry is, whether he has succeeded, in either instance, in showing a title which can prevail against that of the appellant.

II. As between the Papin patent of 1826 and Brazeau's confirmation of 1836, the patent is the better title.—Sarpy

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St. Louis Pub. Schools v. Walker et al.

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v. Papin, 7 Mo. 503; Papin v. Hines, 23 Mo. 275; Cabanné v. Walker, 31 Mo. 285; Papin et al. v. Walker, 32 Mo. 24; Wilcox v. McConnell, 10 Pet.

These cases decide: 1. That a patent issued in 1826, although issued without authority—although for land not then belonging to the United States—although issued for land reserved from sale, will prevail against the title of a defendant showing nothing but naked possession (and the court says that a confirmee, under the act of 1836, trying to inquire into the validity of a prior patent, stands only on his naked possession)—7 Mo. 503. 2. That a confirmee under the act of 1836 cannot defeat an older patent by showing that the land described in the patent is within the limits of the outboundary, and therefore reserved from entry and sale by § 2 of the act of June 13, 1812; that this, although a valid defence if adduced by parties in whose favor the reservation was made, cannot avail a confirmee under the act of 1836, who must recover on the strength of his own title—23 Mo. 275. 3. They decide incidentally that a confirmation under the act of 1836 is defeated by showing that the land is within the outboundary, and designated and set apart for the Public Schools—Papin v. Ryan, 32 Mo. 24; Cabanné v. Walker, 31 Mo. 285.

III. Papin's title under the patent of 1826, standing alone, is void as against the title shown by the Schools.

The fact that, at the time of the issuing of the patent, the fee was still in the United States, does not give validity to the patent, the land being then within the limits of a notorious reservation, and the entry being unauthorized by law—Stoddard v. Chambers, 2 How. 313; Bissell v. Penrose, 8 How. 330-1, 333, 337-9; Kissell v. Schools, 18 How. 27; Kissell v. Schools, 16 Mo. 581.

(a) The reservation in the second section of the act of 1812 of all lands not rightfully owned or claimed, for school purposes, was sufficient to defeat the entry and patent, the land entered being within the limits of a notorious reservation—Kissell v. Schools, 18 How. 27.

(b) If it be insisted that this is the case of a patent, while the Kissell case presents that of an entry, the answer is, that the decision in 18 How. does not rest on the ground that Duncan's title had not ripened into a patent, but upon the ground that the entry was within the limits of the reservation created by the 2d section of the act of 1812; and that the limits of the reservation, so far as the town of St. Louis was concerned, were notorious ever since the incorporation of the town in 1809. So in the case of Stoddard v. Chambers, 2 How. 313, which was the case of a patent against an older concession with definite boundaries, and therefore the entry was held void because there was a definite location to the concession.

There is no conflict between the cases of Stoddard v. Chambers (2 How. 313), Penrose v. Bissell (8 How. 330), and Kissell v. Schools (18 How. 27), on the one hand, and the case of Menard's Heirs v. Massey (8 How. 293), cited by respondents. In the latter case, the patent prevailed because there was no definite location to Cerré's concession: it was a mere floating claim, and no tract of land. In Kissell v. Schools, 18 How., the Supreme Court of the United States held that the incorporation of St. Louis in 1809 constituted a "notorious reservation," and that an entry within its limits was void, because the reservation had "notorious limits."

(c) The reservation thus established by the act of 1812 was never opened or set aside by Congress prior to Papin's entry. (For a list of reserving acts, see Stoddard v. Chambers, 2 How. 313.)

1. Although Congress may by legislation provide for the disposition of reserved lands—i. e. open the reservation and give them a different destiny—so long as it does not legislate, reserved lands cannot be sold—Hammond v. Schools, 9 Mo.; State v. Ham, 19 Mo.

2. The act of April 24, 1820, under which Papin made his entry, did not authorize the sale of reserved lands. It permits only the sale of lands, "the sale of which is or may be



authorized"—3 U. S. Stat. 566. The entry and sale of the Papin lands was not then authorized by law. The act of April 24, 1820, under which the entry was made, did not remove the reservation; hence the entry was void.

3. Although it may not be competent for Brazeau to set up this defence against the patent, because he is a mere trespasser with a junior claim, it is certainly competent for us, claiming under a title which has the effect of a patent.

4. If it be said that the survey of the outboundary was not made till 1843, and therefore there was no definite location to the lands reserved, we say that the definiteness of location and notoriety was derived from the existence and incorporation of the town in 1809 and the act making the reservation. In the Kissell case, Duncan's entry was made in 1830, before the survey of the outboundary, and still this court and the Supreme Court of the United States held that the reservation was "notorious"—Kissell v. Schools and Soulard v. Ott.

We therefore say that the land in controversy being reserved for the schools by § 2 of the act of 13th June, 1812, was not subject to entry in 1826, and respondent's entry and patent are void as against the assignee.

IV. The concession to Brazeau and Soulard's survey did not constitute a rightful claim within the meaning of § 2 of the act of 1812, and the land described in the concession was not "rightfully claimed" at the date of that act.

(a) The assignment in favor of the Schools is conclusive against the respondents, who do not claim (under Brazeau) that the land was not rightfully claimed, but reserved in 1812—Kissell v. Schools, 16 Mo. 581-2.

(b) By lands "rightfully owned or claimed" Congress meant lands confirmed by § 1 of the act of June 13, 1812, or by prior confirming acts, and no others. Inchoate claims, not recognized by the Government, were not "rightful claims"; they could not be enforced.

The action of the Commissioners in 1833 did not confer a rightful claim—they merely recommended for confirmation;

the act of July, 1836, conferred a rightful claim to those, whose lands had not been previously disposed of at the pleasure of the United States, the owner of the fee; the acts of May, 1824, and January 27, 1831, operated as such a final disposition of the land for school purposes, and the act of 1836 found nothing to operate on as far as Brazeau's concession was concerned—*Trotter v. Schools*, 9 Mo. 82-3; *Cabanné v. Walker*, 31 Mo. 285; *Papin v. Ryan*, 32 Mo. 24; *Schools v. Kissell*, 16 Mo. 553; *Kissell v. Schools*, 18 How. 19; *Jones v. Soulard*, 24 How. 41.

V. The land in controversy was not confirmed to Brazeau, being excluded from United States survey given in evidence by the defendants.

Respondents are precluded from denying the correctness of the survey.—*West v. Cochran*, 17 How. 403; *Cutter v. Waddingham*, 33 Mo. 282; *Magwire v. Tyler*, 1 Black, 198; *Dent v. Sigerson*, 29 Mo. 489; Act creating Surv. Gen. Office, 3 U. S. Stat. 325.

VI. The confirmation and U. S. survey to Brazeau do not constitute an independent outstanding title against plaintiff's title—*Sarpy v. Papin*, 7 Mo. 503.

(a) A confirmer under the act of 1836, in a contest with a prior patentee (1826) stands in the position of a trespasser; he has nothing but naked possession—*Papin v. Hines*, 23 Mo. 275; *Cabanné v. Walker*, 31 Mo. 285; *Papin v. Ryan*, 32 Mo. 24.

This court has held in those cases that proof to the effect that land is within the outboundary, and has been designated and set apart for the Public Schools, defeats a title under the confirmation act of 1836. Granting, for the sake of argument, that the fee to school lands did not pass till 1831, still it passed by the act of 1831 effectually to defeat any title derived under the act of 1836.

The school title is the older grant of the two and therefore must prevail against the confirmation; just as the patent, being an older grant than the school title, would prevail

against it were it not for the fact that its issue was wholly unauthorized and therefore void.

The cases of *Menard v. Massey*, 8 How. 293, and *Stoddard v. Chambers*, 2 How. 313, decide that a confirmee under the act of 1836 has no title before the date of that act, which is a mere gratuity.

*Todd and Glover & Shepley*, for defendants in error.

It is submitted that the assignment of the lot in controversy is utterly void as against both the adversary titles given in evidence by defendants, and convey no title as against any one claiming under either of those titles.

I. No title is conveyed by it against those claiming under the patent granted by the United States to Joseph Papin, and

1. This is true even if patented land was not within a tract confirmed by act of July 4, 1836; for

(a) It is the earliest title in point of time from the United States. The patent to Joseph Papin bears date 15th June, 1826. The patent itself is evidence that it was sectionized, offered for sale, and sold in conformity with law.—*Kissell v. Schools*, 16 Mo. 582.

The mere reservation in the act of 1812 gave the Schools no title; it merely was declaratory of an intention on the part of Congress, which might be carried out subsequently, or might not; and the United States could give title to any one to any part of the reserved lands until a final consummation of the title in the Schools—*Hammond v. Schools*, 8 Mo. 73-5; *State v. Ham*, 19 Mo. 592.

The Schools claim title under the act of 1831; therefore, if we for the present assume that the Schools took title at the approval of that act, our title is the earliest from the common grantor. To this it is answered that the act of the Register, Receiver, and President, in issuing the patent, is void as against the United States, as it was by act of Congress reserved from sale for the use of the Schools. To this we answer

(b) The act of 1831 conferred a mere donation. It was

without consideration, and was a mere release from the United States "of all their right, title, and interest." Now the United States had previously sold that land to our grantors, and received a valuable consideration for it, and still holds it. The Schools are in no better situation than the United States, but

(c) The reservation under the act of 1812 for schools cannot by possibility be for the same land reserved under the same act to satisfy private claims.

(d) But in fact the Schools took no title to any land whatsoever until the outboundary was run in 1840.

In the case of *Kissell v. The Schools*, 18 How., at page 25, the court say: "By the act of 1802 the town acquired the promise of an imperfect title to certain vacant lands that might be found to exist within an outboundary survey; but the Government reserved to itself the power to make the survey, and the Board of School Directors was therefore compelled to remain passive until it was completed and the private claims within it ascertained, and until the United States designated the school lands comprehended within it. This survey was completed in 1840 by the Surveyor-General," &c.

Also, patent takes date from its issue—*Cabanné v. Walker*, 31 Mo. 288. But in this case the land in question is within the limits of a tract confirmed by the act of 1836.

2. But before 1840 there had been a recognition by act of Congress of July 4, 1836, that lands within the limits of tracts confirmed by that act had been rightfully sold by the United States—*Menard's Heirs v. Massey*, 8 How. 309-10. For the sake of the argument it may be admitted that the patent had been an absolute nullity before.

Now the United States had through its officers sold and received the purchase money of land within the limits of the confirmed claims, and, beyond all question, before Congress granted any land it was competent for it to make good the titles for which it had received the money; and this it proceeded to do, and legalized the title its officers had patented to us. If Congress was competent to confirm the particular

tracts to one set of claimants, it was entirely competent to confirm to another set of claimants, who it regarded as more meritorious, part of the same claim. Its power was no more restricted in the one case than in the other. It will hardly be urged here, and now that the patent was void, because it was for land reserved from sale as embraced in the claim of Brazeau, which was subsequently confirmed. This pretence has been set at rest by the cases—*Papin v. Hines*, 23 Mo. 274; *Cabanné v. Walker*, 31 Mo. 286; *Menard's Heirs v. Massey*, 8 How. (U. S.) 308.

II. The title here set up by the Schools is invalid as against any one claiming under a confirmation by the act of July 4, 1836, of the same land.

By the act of 1812 there was reserved for schools land not rightfully owned or claimed by any "private individuals." That act provides for modes and methods of ascertaining what lands were rightfully owned or claimed by private individuals; by its provisions it reserved the right to determine what lands were so rightfully claimed. Now as the act of 1831 grants *only* the lands reserved by the act of 1812, one way of ascertaining the true construction of the act of 1831 is to consider, that, instead of there being a reservation by the act of 1812, there had been a grant in that act to the Schools with precisely similar words. What, then, would have been the effect? Every one would say that it took only what was left after the United States had decided what was rightfully owned and claimed. Even if the outboundary had been run prior to July 4, 1836, yet the Schools took subject to the right of the United States to designate what were rightful claims—*Hammond v. Schools*, 8 Mo. 75; *Kissell v. Schools*, 16 Mo. 579.

III. By the construction, contended for by plaintiff, no confirmation by the act of 1836 is good as against the Schools within the limits of the outboundary of any town or village.

HOLMES, Judge, delivered the opinion of the court.

The case depends upon the question raised by the instruc-

tion which the court of its own motion gave for the defendants. That instruction declares, in effect, that an inchoate Spanish claim resting upon a concession and survey which had been duly presented for investigation by the Board of Commissioners under the acts of Congress of 1805 and 1807, and was reserved by the act of 1811 and subsequent acts, and was finally confirmed by the acts of Congress of the 4th of July, 1836, was a lot "rightfully claimed" by a private individual, and was excepted as such out of the reservation for schools and military purposes contained in the act of Congress of 13th June, 1812, and was therefore not within the purview of the act of Congress of the 27th of January, 1831, and that the designation and survey of this lot to the schools made by the Surveyor-General on the 31st day of June, 1831, was therefore null and void.

It is a question of some difficulty, upon which there has been as yet no authoritative judicial decision. The case of *Cabanné v. Walker*, 31 Mo. 274, suggests doubts, but really decides nothing concerning it. In the case of *Hammond v. Public Schools*, 8 Mo. 75, the position was taken that by the several acts of Congress relating to the subject the United States had reserved the right of ascertaining what lots were rightfully claimed by individuals, and retained the power of determining who rightfully claimed a lot (citing the opinion of Baldwin, J., in *Strother v. Lucas*, 10 Pet. 445); and it was then held that a confirmation of a town lot by the act of 1816 was a final determination on the part of the Government that such lot had been rightfully claimed, and did not come within the reservation for schools. We see no reason why the same principle should not be applied to this confirmation by the act of 1836 of a claim reserved for a similar purpose, and finally determined by the same authority to have been a lot rightfully claimed by a private individual.

Such claims have always been considered by the courts in the light of equities addressed to the justice of Congress, under the obligation imposed on the Government by the treaty of Paris. The filing of such a claim, with the evidences in



support of it, in pursuance of the provisions of the act of Congress of 1805, and the supplementary acts, where it has been confirmed, has been regarded as the first act towards a complete conveyance of the title, and as giving an inceptive right derived from an act of Congress, to which the patent related when issued.

It has been said by this court, that it was the general design of the act of 1812 to dispose of all the property included within the outboundary of the towns—*Kissell v. Schools*, 16 Mo. 595. At the date of this act there was a class of claims (of which this of Brazeau was one) then standing reserved by the act of 1811 for the final determination of Congress upon this very question, whether or not they were rightfully claimed by private individuals.

So many of the claims filed as were found to come within the provisions of the previous acts had been confirmed by the old board; the remainder were reserved. The act of 1812 disposed of the lots which came within its purview; the rest, which were supposed to be vacant and unclaimed, were, by the second section, reserved for military purposes and the use of schools, with the express exception of such lots as were rightfully owned or claimed by private individuals.

This claim of Brazeau had been duly filed with the evidences of its rightful origin, among which was an official Spanish survey showing its definite location and boundaries, and it unquestionably came within the reservation of the act of 1811 and subsequent acts down to the 26th of May, 1828. It had been rejected by the old board because not fulfilling the requisites of existing laws, and not because it was not an authentic grant and a meritorious claim, according to the laws, usages, and customs of the former government. It stood barred between 1828 and 1832, and might then have been treated as having fallen back into the mass of public lands, or as subject to assignment for schools. By the act of 1832 this bar was removed, and it was again recognized by Congress as a rightful claim still subsisting, and was confirmed as such by the act of 1836. It was thus finally de-

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terminated by the political power that this land always had been rightfully claimed. The courts have no jurisdiction to investigate the grounds of this action. It was the exercise of the right and power which has been retained by the Government. The mere fact that it had stood barred for a few years is nothing to the purpose. This subsequent recognition and final confirmation of the claim passed the title to the claimant subject to the conditions imposed by the confirming act, and it was thereby necessarily implied and conclusively determined, as against any one not able to show a better title, that it always had been a lot rightfully claimed, and was one of those which were expressly excepted out of the reservation for schools. It necessarily follows that this land did not come within the purview of the act of 1824 as a "vacant" lot to be set apart for schools, nor of the act of 1831 as a lot "reserved for the support of schools." The act of the Surveyor-General, therefore, designating and setting apart this land to the schools was without the authority of law, not within the scope of his power, and utterly null and void.

It has been decided, and is not open to question, that the designation and survey of a given piece of land to the schools, when executed according to law, brings the lot within the operation of the act of 1831 as a grant of title, and is presumptive evidence that the land so designated and set apart for schools is *a lot* within the meaning of the acts of Congress, and makes a regular formal title to the property, and that the act of the officer will be intended to be within the scope of his authority until the contrary appears—*Eberle v. Pub. Schools*, 11 Mo. 264; *Kissell v. Pub. Schools*, 16 Mo. 550. The essential question in those cases was, whether the land was a lot within the meaning of the reservation; and it was held by the Supreme Court of the United States in *Kissell v. Pub. Schools*, 1 How. (U. S.) 25, that the court had no power "to revise the acts of the Surveyor-General under the statutes"; that "it was not open to them to inquire whether the lands set apart were or were not lots of the de-

scription referred to in the statutes"; that the parties interested (that is, the Government and the Schools) having agreed that the land in question was "a school lot," there the matter must rest, "unless some third person could show a better title." The decision proceeds upon the same ground herein taken, that the action of the political power is not subject to review by the courts in favor of any one who cannot show a prior or a better title. This court had made no question but that the lands which the act of eighteen hundred and twenty-four authorized to be set apart for schools, under the limitations of the act of 1812, should be "vacant" and "not rightfully claimed by individuals"—16 Mo. 580. The Government had determined in 1836 that this land had been rightfully claimed by Brazeau, and given him the full title subject to the conditions imposed. The Surveyor-General in 1861, without any special instructions from the Commissioner to that effect, undertakes to review this action of the higher political authority, and determines to the contrary; and the question really is, which was the first binding and conclusive determination. It seems to us that to state this question is to answer it without more. When the matter was once determined, the power of the Government over it was exhausted; the title of the United States had passed to the claimant, or to previous purchasers whose titles were ratified; rights had become vested under; and it was not in the power of the Surveyor-General to divest them, nor to reverse the action of Congress. It has been held that even the head of the Interior Department has no power to reverse or annul the final action of his predecessor in office, in the matter of a survey—U. States v. Stone, 2 Wall, (U. S.) 525.

It is contended that the designation and survey relate back to the date of the granting act of 1831, and vest a title in the Schools as of that date; and so, that the plaintiff has the prior and better title, and that the land is thus brought in favor of the plaintiff within the exception of the second section of the act of 1836 of lands "previously located" under a law of the United States, or "surveyed and sold by the Uni-

ted States" to the plaintiff—5 U. S. Stat. p. 127, § 2. This would have been so if the lot had been within the reservation for schools, and if the Surveyor-General had any lawful authority to make an assignment of this land to the schools, and if a better title had not already been conveyed by the United States to another person. A void act can have no relation back. When the grantor has no longer any title to the land, even a patent will be ineffectual and void. Even if it could relate back to the date of the act of 1831, it could not avail the plaintiff; for the confirmation in this case also relates back to the filing of the claim as between the Government and the confirmer or his legal representatives, and the confirmer would have a prior title. In *Stoddard v. Chambers*, 2 How. (U. S.) 313, where the claim had been filed with definite boundaries and location on which a reservation could operate, and where the land had not been previously sold according to law, the confirmation by this act of 1836 was held to vest the title in the confirmer or his legal representatives, and to enure by estoppel to his grantee by a deed executed in 1804. As between the parties, a patent upon a confirmation by the old board relates back to the filing of the claim as the inception of the title—*Landes v. Brant*, 10 How. (U. S.) 343. The same doctrine is to be applied here; the principle is the same. This claim was filed and reserved in the same manner and under the same laws as in that case. The successive boards merely took up the claims as originally filed for investigation. The act of the 9th of July, 1832 (4 U. S. Stat. 565), authorized the board "to examine all the unconfirmed claims to land in the State heretofore filed in the office of said Recorder," and directed them to proceed "with or without any new application of the claimants." The confirmation and survey were equivalent to a patent, and may just as well have relation back, as a patent would in like case, as against any title which did not intervene during the period when there was no reservation, or which was not a prior or a better title.

In *Menard's Heirs v. Massey*, 8 How. (U. S.) 293, it was

decided that the confirmation in that case did not relate back beyond the date of the act, for the reason that, until the survey by the United States, there had been no tract of land with any defined location and boundaries on which the reservation could operate, and therefore that a patent from the United States in 1826 of land not reserved from sale was not overreached by relation. It was also distinctly held that if the claim had been filed with the Recorder in 1806, with a survey showing its boundaries, so that it would have fallen within the reservation as a defined tract of land, it would still have come within the exception of the second section of the act of the 4th of July, 1836, as land surveyed and sold by the United States. It was said that Congress might confirm these claims on such conditions as they saw fit to prescribe. This decision on this point has been followed by this court—*Papin v. Hines*, 23 Mo. 274 ; *Papin v. Ryan*, 36 Mo. 406.

It results from this that the confirmation to Brazeau cannot relate back to overreach the patent to Papin in 1826 for the reason that the land had been previously surveyed and sold to him, and was excepted out of the confirmation as against his patent, which was recognized by the act itself and thus ratified from its date ; but between the Government and the confirmer, and as against any one not showing a better title of this kind, it may still have relation. The confirmation is not wholly void by reason of the exception imposed as a condition of the grant. It is invalid only as against such previous sale of this land. There was no previous sale of this land to the Schools for the reason that it had been rightfully claimed by a private individual, and never came within the reservation for schools. The confirmation is conclusive on this matter. The same act gives to the claimant the right to locate other lands in lieu of those which had been thus previously sold out of his claim. The validity and rightfulness of the claim were still fully recognized by the Government and thus far made effectual to the claimant.

Now if the case stood upon the record only as a controversy between the entry and patent and the school title, without reference to the act of 1836, the designation and survey to the schools could not be disputed by the defendants, standing on the entry and patent alone, for the reason that the land at that date as a lot not rightfully claimed by any private individual would have been within the reservation for the schools and military purposes and not authorized by any law to be sold; and the case would have fallen within the decisions in like cases—*Kissell v. Schools*, 18 How. (U. S.) 27; *Jones v. Soulard*, 24 How. (U. S.) 41; *Jackson v. Wilcox*, 13 Pet. 498; *State v. Ham*, 19 Mo. 602. But the title had passed out of the United States either by the confirmation or by the patent. Possession was evidence of title against all but the sovereign proprietor of the soil; and the defendants were in a position to show a better outstanding title in the representatives of Brazeau, or a better title in themselves. As between Brazeau and the patentee, the confirming act recognizing the claim confirms the land to him, but imposes the condition that the previous sale by entry and patent, though not authorized by any law when made, shall be deemed valid to convey this land to the patentee, and gives Brazeau the right to locate other lands in lieu thereof. The subsequent legislation, according to the decision in *Ménard's Heirs v. Massey*, 8 How. (U. S.) 293, and in *Cabanné v. Walker*, 31 Mo. 274, and *Papin v. Hines*, 23 Mo. 274, makes the patent valid from its date notwithstanding the previous reservation. The defendants, therefore, are in a position to call in question the validity of the assignment of this land to the schools as effectually as Brazeau could have done if no condition had been imposed upon his confirmation. They are able to show a better title than the plaintiff, and having done so the plaintiff is not entitled to recover.

Judgment affirmed. The other judges concur.



ANN C. SPECK, Appellant, v. JOHN RIFFIN, Respondent.

1. *Estoppel—Judgments.*—The doctrine of the conclusiveness of judgments conduces to peace and repose, and it cannot be disturbed without unsettling rules of property and producing irreparable mischief.
2. *Conveyances—Evidence—Notice—Records—Lands and Land Titles.*—Notice is either actual or constructive. It is actual when the purchaser knows of the existence of the adverse claim, or is conscious of having the means of knowledge, although he may not use them; it is constructive when the law presumes it.

*Appeal from St. Louis Circuit Court.*

*B. A. Hill* and *A. Todd*, for appellant.

*Gibson* and *Field*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

Every material point involved in this case has been already passed upon by this court, and we have no inclination even did we feel ourselves at liberty to enter into a re-examination of the subject. The prior decisions have settled the title to the property now attempted to be contested, as firmly as it is possible for the adjudications of a court to settle anything—*Wohlien v Speck*, 18 Mo. 563; *Speck v. Wohlien*, 22 Mo. 314.

The doctrine of the conclusiveness of judgments conduces to peace and repose, and it cannot be disturbed without unsettling rules of property and producing irreparable mischief.

The only plausible pretext for distinguishing this case from the former ones in this court is, that the plaintiff purchased in good faith and without notice. But we perceive no merits in this assumption. Notice may be either actual or constructive. It is actual when the purchaser either knows of the existence of the adverse claim or title, or is conscious of having the means of knowing, although he may not use them. Constructive notice is a legal presumption, and will be conclusive unless rebutted (*Rogers v. Jones*, 8 N. H. 264); and in many cases it cannot be gainsayed or denied even by evi-

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dence of the absence of actual knowledge or notice—Griffith v. Griffith, 1 Hoff. Ch. 153.

But the record clearly discloses the fact that the plaintiff had notice, for in her petition to the County Court she declares that she purchased the premises and paid a full consideration therefor in good faith, believing that she was acquiring a full and complete title to the same by virtue of the deed and the proceedings for the sale of the real estate of the deceased Wohlien.

Now these very proceedings were in contention when the Speck and Wohlien cases were in this court, and it was held that no title accrued to the plaintiff by virtue of them. It is clearly evident that the plaintiff has proceeded throughout upon a mistake of law, and not through a mistake or ignorance of facts. A party may be estopped by giving a matter in evidence as well as by pleading it; and after the deliberate admission which plaintiff made in her petition, she cannot now be heard in asserting anything to the contrary, especially when others are to be injuriously affected by it.

Judgment affirmed. The other judges concur.

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JOHN MAGWIRE, Respondent, v. MARY L. TYLER *et als.*, Appellants.

1. *Lands and Land Titles—Patents—Confirmations—Relation.*—Where two patents for the same land are issued by the United States, the elder patent conveys the absolute title, and if nothing more appear the junior patent is void. Where patents are issued upon confirmations by the Government, the legal title by relation takes effect from the first act in the inception of the title, which under confirmations of the old Board of Commissioners was the filing of the claim and papers in support thereof with the clerk; and where a confirmation was made upon a claim not filed by the claimant, the patent can relate back only to the date of the judgment of confirmation.
2. *Lands and Land Titles—Board of Commissioners—Jurisdiction—Confirmations.*—The Boards of Commissioners acting under the authority of the act of Mar. 2, 1805, and Mar. 3, 1807, had no jurisdiction to confirm lands to any person unless he filed his claim and made proof of title as required

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by the statutes, and a confirmation made without such claim and proofs is void.

3. *Lands and Land Titles—Confirmations—Patents—Equities.*—Under different confirmations under the laws of the United States, the first equities against the Government of which a court can take notice are the inceptive acts, such as filing claims, &c., required by the statutes providing for such confirmations. Prior to such acts, unconfirmed claims or inchoate titles present nothing but an equity addressed to the political power, of which courts cannot take cognizance. The decision of the Government is final as to the comparative merit of all such claims.
4. *Lands and Land Titles—Judgment—Estoppel—Equity.*—A decree in chancery between the same parties, proceeding upon the same substantial facts and grounds of equity, is conclusive. M. brought his bill, claiming an equitable title to a part of a tract of land patented to L. upon the ground that the part claimed had been confirmed to him by the United States, and that the survey made for L. was erroneous. The facts were found, and decree rendered against M. Subsequently M. procured a survey and patent for the land and brought a new bill—*Held*, that the former decree was conclusive as to the equities between the parties.

*Appeal from St. Louis Court of Common Pleas.*

The plaintiff filed his petition in equity against the defendants on September 18, 1862, in the St. Louis Land Court, as junior patentee under one Brazeau, patent dated June 10, 1862, to divest the title of defendants under a senior patent to Louis Labeaume of 25th March, 1852, issued on a Spanish survey for Labeaume of 1799, and a confirmation of 22d September, 1810, upon a claim by Labeaume filed 26th February, 1806, for confirmation.

The respective titles of the parties were the same as stated in the cases of *Magwire v. Tyler*, 25 Mo. 433; S. C. 30 Mo. 202, and S. C., on appeal, 1 Black. (U. S.) 195, and *West v. Cochran*, 17 How. (U. S.) 411, with this exception: that after the decision in 1 Black, 195, the plaintiff procured a U. S. survey and a patent locating the sixteen arpents (confirmed to Brazeau) within the limits of the land confirmed, surveyed for, and patented to, Labeaume.

To the present bill the defendants also pleaded the finding and judgment in the case of *Magwire v. Tyler*, in the St. Louis Land Court, affirmed (30 Mo. 202), as a bar, as follows:

*"June 23, 1858.*

"This cause came on to be heard before the court, and after hearing all the evidence of the parties, the court find from the evidence the following facts, viz.:

"That on the fifth day of October, in the year 1793, the Spanish Government conceded or granted to one Esther, a free mulattress, a tract or parcel of land situate on the border of the Mississippi river, and between that and the earth-barn, La Grange de Terre, as stated in the plaintiff's petition. The concession to Esther had no definitive location by the terms of the grant, but she took possession under said grant of a tract of land lying between the Big mound and the Mississippi river.

"That on the twenty-fifth day of June, in the year 1794, the said Spanish Government conceded or granted to one Joseph Brazeau a tract or parcel of land of four arpents in front by twenty arpents in depth as described and bounded as stated in plaintiff's petition. That the said Brazeau took possession of said tract or parcel of land so granted by said government about the time of said concession. That afterwards, on the ninth day of May, in the year 1798, the said Joseph Brazeau, by his deed of that date, sold and conveyed the said tract or parcel of land conceded and granted to him as aforesaid to one Louis Labeaume, excepting, however, and said Brazeau in his said deed reserved to himself four arpents of said tract of land 'to be taken at the foot of the hillock in the southern part of said land'; that the said four arpents so reserved by said Brazeau in his said deed to said Labeaume are situate within the limits of the outboundary line of the village of St. Louis, run in conformity to the first section of the act of Congress making further provision for settling the claims to land in Missouri Territory, approved June 13, 1812.

"That after said sale and conveyance to Labeaume by Brazeau, but prior to the fifteenth day of February, in the year 1799, the said Louis Labeaume petitioned said Spanish Government for a grant of three hundred and sixty arpents

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of land, including that which he had acquired of said Brazeau—that is to say, twenty arpents in depth from the Mississippi river, ascending Rocky branch west quarter south, by sixteen arpents front, along the Mississippi, to be taken from the descent of the road into the creek as stated in plaintiff's petition; that said Spanish Government caused the land petitioned for as aforesaid by said Labeaume to be surveyed by one Antonio Soulard, acting surveyor under said government at the time stated in plaintiff's petition—which said survey does not embrace any portion of the land reserved by Joseph Brazeau in said deed to Labeaume, dated the ninth day of May, 1798.

“That the Board of Commissioners for the adjustment of land titles, in the Territory of Missouri, on the twenty-second day of September, in the year 1810, confirmed to said Joseph Brazeau the said four arpents.

“That the said Commissioners on the fourteenth day of June, in the year 1811, issued their certificate of confirmation, No. 983, as stated in the plaintiff's petition. That the said Joseph Brazeau and his wife, on the twenty-sixth day of June, in the year 1816, by their deed of that date, conveyed all the right, title and interest in said four by four arpents of land to one Pierre Chouteau, which deed was duly recorded as stated in plaintiff's petition.

“That in the month of November, in the year 1817, by authority of the United States, and under the direction of the Surveyor-General for the district of Illinois and Missouri, the said four by four arpents of land were surveyed by Joseph C. Brown, of which the following is a copy.

“No. 982 & 983. Township No. 45 north, range No. 47 E. of 5th principal meridian. Surveyed by Louis Labeaume *two* tracts in one. The one confirmed in his own name for 356 arpents. The other under Joseph Brazeau for 4 arpents, together 360 arpents, equal to 306½ acres, beginning at the mouth of the branch, the S. E. corner of Easton's tract; thence down the Mississippi river, bending therewith,' &c. &c. 'November, 1817. (Signed) Joseph C. Brown, D. S.'

"That on the first day of June, in the year 1826, Pierre Chouteau and wife, by their deed of that date, conveyed the said four by four arpents to one George F. Strother ; which deed was duly recorded, as stated in the plaintiff's petition. The said George F. Strother and his wife, on the third day of September, in the year 1830, by their deed of that date, conveyed the said four by four arpents of land, with other tracts of land, to John Mullanphy and John O'Fallon, in trust for the sole use and behoof of the Marine Railway Company.

"That in the month of November, in the year 1840, the said George F. Strother departed this life, and administration in due form of law was had on his estate, and in like due course of law all the right, title, interest and estate of said Strother in and to said four by four arpents of land were sold by the administratrix of said estate and conveyed to the plaintiff.

"That on the second day of January, in the year 1852, John O'Fallon (the said John Mullanphy having before that departed this life), by authority and direction of said Marine Railway Company, conveyed by deed all the right, title and interest of said Marine Railway Company to the plaintiff in the land north of the ditch called Labeaume's ditch.

"That the said tract of four by four arpents of land which was confirmed to said Joseph Brazeau is situate in the northern part of the present city of St. Louis, in the county of St. Louis, on the south side of the old ditch called and known as Labeaume's south ditch.

"That the said Pierre Chouteau, under whom plaintiff claims title to the land in question, on the fifteenth day of October, 1799, petitioned for a tract of land between Roy and Labeaume, of the width of six arpents. That Labeaume's ditches were then made ; that Chouteau in his petition called for the line of the land of Louis Labeaume for his northern boundary ; that at this time Joseph Brazeau had promised to convey the four by four arpents to said Pierre Chouteau. That at the time of the survey made in 1803, the south ditch of Labeaume was recognized by all the adjoining proprietors



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as Labeaume's south line ; and that possession was claimed and held with such recognition from the time of said survey in 1803 until about 1823. That all the defendants respectively claim title and the right to possess the part and parts which they do respectively possess and claim of said four by four arpents of land, under one Louis Labeaume or his legal representatives ; and that the defendants do hold, claim and possess portions of said tract of four by four arpents in the manner and to the extent stated in the plaintiff's petition. And that the said tract of four by four arpents of land, at the time of the confirmation thereof to said Joseph Brazeau as aforesaid was not definitively located by the metes and bounds. That on the tenth day of September, 1810, Jacques Clamorgan, who claimed the Esther grant by deed from her, the 2d September, 1797, conveyed the same grant to said Pierre Chouteau.

"And from the evidence aforesaid, the court further finds that said Labeaume, in February, in the year 1806, filed his claim for confirmation before the said Board of Commissioners for the adjustment of land titles for the Territory of Missouri, and said Board of Commissioners confirmed to him three hundred and fifty-six arpents, and to Joseph Brazeau four arpents, as stated in defendants' answer.

"That said Labeaume made the ditches and enclosures mentioned in the defendants' answer. That under the said confirmation to said Labeaume a survey of the tract of land so confirmed was ordered by the Secretary of the Department of the Interior of the United States Government ; and in the year 1852 a survey thereof was made under and in pursuance of the instructions of said Secretary ; and which survey was afterwards approved on the twenty-sixth day of February, in the year 1852 ; and thereupon a patent certificate was issued by the Recorder of land titles, certifying to the effect that Louis Labeaume or his legal representatives was entitled to a patent under said confirmation and survey for  $339\frac{68}{100}$  acres, equal to  $390\frac{30}{100}$  arpents. That afterwards, and on the twenty-fifth day of March, in the year 1852, a patent

was issued by the Government of the United States, granting said tract of land described in the last-mentioned survey to said Labeaume or his legal representatives, and to his or their heirs and assigns ; saving and reserving, however, any valid adverse rights which may exist to any part thereof.

“That when said last-mentioned survey was made, and also when said patent was issued, as aforesaid, to said Labeaume or his legal representatives, the defendants had knowledge that the plaintiff claimed to be the legal representative of said Joseph Brazeau, under and in virtue of the deeds and conveyances and the documents and proceedings set out in the plaintiff’s petition. And that he claimed to have and to hold the equitable title to said four by four arpents reserved by said Brazeau in his said deed to said Labeaume.

“The court further finds that there is no evidence that survey No. 3,333, for Louis Labeaume or his legal representatives, or the patent thereon, were obtained by any fraud whatever.

“That the U. S. survey, No. 3,332, for Joseph Brazeau’s legal representatives, was made, and a patent was issued thereon, in 1852, as alleged in the answer of the defendants, for the Brazeau reservation, and that said survey and patent do not embrace any land lying north of said south ditch of Labeaume. That the conveyance made by Labeaume and Chambers in 1816, through whom the defendants claim title, was made upon good and valuable consideration, and without any notice of the equities now set up by the plaintiff. That said Louis Labeaume and those claiming under him have had possession of and have used, occupied and enjoyed the premises in controversy from about 1798 to the time of the commencement of this suit.

“The court decides, upon the foregoing facts, that the plaintiff is not entitled to the relief sought by his bill, and that said petition should be dismissed at the cost of the plaintiff.

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“Upon the finding as aforesaid, it is ordered and adjudged by the court that the plaintiff take nothing by this suit in this behalf; but that the defendants go hence without day, and recover of said plaintiff their costs and charges herein expended, and have execution therefor.”

*B. A. Hill and J. R. Shepley*, for appellants.

I. All the equities, claims, and pretences, now set up by the plaintiff, were adjudicated in a former suit in equity between the same parties and privies, and in regard to the same subject matter. The same identical facts were stated in plaintiff's petition of August 22, 1855—on which the St. Louis Land Court, on 22d June, 1858, entered a finding of all the material facts, under the code of 1849, in favor of the defendants, and a final decree and judgment.

Plaintiff avers in this second suit that he has obtained a new survey and patent in June, 1862, for the Brazeau reservation, in the south-east corner of Labeaume's patent, and claims the same identical equitable relief asked in the former suit.

A.—The finding of the facts, and the judgment and decree thereon, in the former suit in equity, being full and specific as to all the equities now set up, the judgment and decree in said former suit is conclusive upon the plaintiff as to all the matters determined or in controversy in said former suit—*Lessee of Parrish v. Ferris et als.*, 2 Black, (U. S.) 608; 2 Sto. Eq. § 1523 and note. Mitf. Eq. Pl. by Jer. 236-8, states the rule fully and all the cases: “A decree or order dismissing a former bill for the same matter may be pleaded in bar to a new bill, if the dismissal was upon hearing, and was not in terms directed to be without prejudice—Id. 238; see 2 Smith's L. C. 424, and note to *Dutchess of Kingston's* case.

B.—The former decree is conclusive of the claims, equities and pretensions of the plaintiff in the former suit in equity as to all the facts found by the court in that suit upon the hearing that were material in the cause—*Perine v. Dunn*,

4 Johns. Ch. 142; Neafie v. Neafie, 7 Johns. Ch. 1; Sto. Eq. Pl. § 793; Wilcox v. Badger, 6 Ohio, 406; Jenkins v. Eldridge, 3 Sto. Ch. C. 299; 2 Dan. Ch. Pr. 753-4; Holmes v. Remsen, 7 Johns. Ch. 286; 2 Dan. Ch. Pr. 1209, and 1199 and notes; French v. French, 8 Ohio, 214.

C.—The finding of the facts in the former suit under the code of 1849 operates as a special verdict upon all material issues in the pleadings, and are a part of the decree and judgment in the case, and concludes all parties as part of the record—Sutter v. Street, 21 Mo. 157-60; Freeland v. Eldridge, 19 Mo. 325; Bates v. Bower, 17 Mo. 550; Lewis v. Stafford, 4 Bibb, 320; Farrar v. Lyon, 19 Mo. 122; McLary v. Bowman, 3 Litt. 248; Walsh's case, id. 142; Javins v. Harris, 20 Mo. 262; Voorhis v. Bk. of U. S. 10 Pet. 449; Lytle's case, 22 How. (U. S.) 193, 207; Montford v. Hunt, 3 Wash. C. C. R. 28.

D.—The present petition asks relief upon the same identical equities and upon the same facts adjudicated and determined in the former suit. Four leading facts are alleged in the former petition and in the present petition to establish plaintiff's equity, to wit:

1. That Soulard made the Spanish survey of the land asked for by Labeaume, in 1799, by mistake or design, so as to include the Brazeau reservation.

2. That the confirmation of 1810 to Labeaume and to Brazeau were so made as to include the four by four arpents of Brazeau within the survey of Soulard for Labeaume.

3. That the Brazeau reservation is properly to be located within the Soulard survey, from the relative position and location of the surrounding tracts.

4. That defendants and their grantors claiming under Labeaume are not innocent purchasers; that they had notice of the reservation being within the Soulard survey for Labeaume, and confederated to procure the patent to Labeaume for Brazeau's reservation.

On each of these allegations the court in the former suit found for the defendants, and decreed accordingly. On these

same allegations in the present petition, the court (Reber, J.) finds exactly the opposite, and they raise the same equity in favor of plaintiff that was determined against him in the former suit.

Plaintiff does not pretend to claim any equitable rights under the new patent of 1862, but insists upon the same four facts on which the finding was had in the former suit, and none other. The finding of these four facts in favor of the defendants, upon the issues made in the former suit, and the judgment and decree entered thereon, are conclusive against the plaintiff in this suit upon all equities claimed herein, for they are *res adjudicata*. See cases cited above under points A, B, and C; also, 3 Dallas, 54; 1 Cond. R. 21; 4 Wheat. 217; 4 Cond. R. 426; 6 Wheat. 108; 1 Mason C. C. R. 515; 3 Cranch, 487.

II. All the equities set up in the former petition and in the present petition are thus disposed of as *res adjudicata*, and the plaintiff stands before the court upon the new patent of 1862 alone.

This second patent, under the same confirmation, if it were not void, raises only a legal title, and gives no equity to assail the Labeaume patent upon equities already adjudicated in the former suit. All the equities now relied upon having been adjudged against the plaintiff in the former suit, the plaintiff must stand upon the new patent alone, and has no remedy except to sue in ejectment; and the new patent could not prevail against the old one at law. Equity cannot aid the junior patentee claiming land covered by an elder patent unless the junior patentee can show beyond a reasonable doubt that the land covered by the elder patent is equitably and rightfully his property under the junior patent.

III. The new patent to Brazeau of 1862 is a nullity; and passes no title or claim of title to plaintiff, for the reason that the United States had previously granted the same land to Labeaume.

By the acts of Congress of 2d March, 1805, and 3d March, 1807 (1 Land Laws, 122 & 153), it is provided that the con-

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firmation shall be made to the claimant, and that the patent certificate shall be made to the party confirmed for a tract of land to be designated in the patent certificate—§ 6, act of 1807, p. 154, Land Laws. It is manifest, therefore, that but one patent can issue upon the same confirmation to the same person, and it must be for the parcel of land designated in the patent certificate.

The patent certificate to Brazeau declares that he is entitled to a patent for four arpents of land on the Mississippi, to be surveyed agreeably to a reserve made in a sale of Brazeau to Labeaume, recorded in book C, p. 339, of the Recorder's office. This is the deed of May 9, 1798, which fixes the reservation at "the foot of the mound" four arpents square, and south of the Labeaume tract surveyed by Soulard.

Congress alone has the power to dispose of the public lands, and the title can only pass to Brazeau in accordance with the said acts of Congress—*Wilcox v. Jackson*, 13 Pet. 498; *Landes v. Brant*, 10 How. 348, 370; *Menard v. Massey*, 8 How. 293, 306-7; *Berthold v. McDonald*, 22 How. 334, 341; *Burgess v. Gray*, 16 How. 48, 65; *Willott v. Sandford*, 19 How. 79, 82; *Strother v. Lucas*, 12 Pet. 415; *Haile v. Gaines*, 22 How. 144, 160; *Chouteau v. Eckhart*, 2 How. 345; *Lafayette's Heirs v. Kenton*, 18 How. 197; *Doe v. Braden*, 16 id. 635, 657; *Foster v. Neilson*, 2 Pet. 253, 307, 309; *Garcia v. Lee*, 12 Pet. 511, 520; *LeBois v. Brammell*, 4 How. 449, 461; *Mackey v. Dillon*, 4 How. 400.

The title passes to a claimant, under the acts of Congress of 1805 and 1807, in the following manner:

1. The claimant files his claim with the Recorder of land titles for the tract of land, and presents his title papers for record.
2. He produces his evidence of possession prior to 1803.
3. Judgment of confirmation is entered of record upon the claim and the evidence.
4. An United States survey of the confirmation is made unless an authentic Spanish survey shall appear of record, as in case of Soulard's survey for Labeaume.
5. A patent certificate is issued on the Spanish



survey or the U. S. survey. 6. The patent—§§ 1-4, act of 1805; §§ 1-7, act of 1807.

Under these acts of Congress there were two confirmations, one to Labeaume for the land included in Soulard's survey, and the other to Brazeau for the land at the foot of the mound, south of Soulard's survey; two patent certificates were issued, one to Labeaume and one to Brazeau, for two different tracts of land; two distinct surveys were made in 1852—one for Labeaume, retracing the authentic Spanish survey of 1799, and the other for Brazeau, locating his reservation at the foot of the Big mound, according to the express calls of the deed of 1798; and on each of these surveys a patent issued to the parties respectively—one to Labeaume, in March, 1852, for the land in Soulard's survey of 1799, and the other to Brazeau, on the same day, for the land at the foot of the Big mound, south of Soulard's survey and stockade, where the respective parties had possessed for over half a century by a common boundary line, the one on the south and the other on the north of the stockade—*West v. Cochran*, 17 How. 403.

The patent to Brazeau of 1852 was in evidence in *West v. Cochran*, and it was held to be effectual to pass a title to plaintiff for the land south of Labeaume's tract at the foot of the Big mound, and that no title vested in plaintiff for any other land under that confirmation—pp. 412-16.

Two controlling propositions are established by the decision in *West v. Cochran*: 1. That the confirmation to Labeaume of 1810 was according to the recorded Spanish survey of Soulard for Labeaume of 1799—p. 412. 2. That the confirmation to Brazeau was to be located by an U. S. survey; that it was so located in 1852, and that the title vested in plaintiff at that time, according to that location, for the four by four arpents of land at the foot of the Big mound—pp. 412-13.

The precise effect of the two patents was determined in that case. The confirmation to Labeaume was held to be for a tract of land defined by a recorded Spanish survey of 1799, and the title passed from the United States to Labeaume for

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that specific tract of land on 26th February, 1806, by relation of the patent to the day of claim—*Landes v. Brant*, 10 How. 348, 370; *West v. Cochran*, 17 How. p. 412.

The new patent, issued in violation of law in 1862, on the confirmation to Brazeau, is for a portion of the same land confirmed to Labeaume in 1810, and is included within Soulard's survey for Labeaume of 1799 and the patent to Labeaume of 1852. This new patent is void, under the decision in *West v. Cochran*, 17 How. 412 & 417, for the reason that the court held that all the land within Soulard's survey of 1799 was granted by the United States to Labeaume by force of the confirmation of 1810 and the patent of 1852, duly issued under the acts of 1805 and 1807.

The first grant being complete and perfect under said acts of Congress, the second grant for a portion of the same land is absolutely null and void, and can pass no title to the plaintiff, the United States having previously parted with the title in due form of law—*Magwire v. Tyler*, 1 Black, 198, S. C. U. S. The Supreme Court of Missouri, in *Mitchell v. Handfield*, 33 Mo. 438, gave the true construction to the confirmation to Labeaume, and to the decisions of *West v. Cochran* and *Magwire v. Tyler*.

As between these two titles, the elder one must always prevail at law or in equity—*West v. Cochran*, 17 How.; *Mackey v. Dillon*, 4 How.; *LeBois v. Brammell*, 4 How.; *Magwire v. Tyler*, 1 Black; *Mitchell v. Handfield*, 33 Mo.; *Cage v. Danks*, 13 Ann. La. R. 128.

A.—The new patent of 1862 is void for the further reason that the Secretary of the Interior had no power to annul a patent issued upon a final decision recorded more than ten years before, in the same case, by his predecessor in the same office.

The title to the land confirmed to Brazeau passed according to the provisions of the acts of Congress of 1805 and 1807, above referred to, and the power to locate it was expressly reserved to the executive department, there being no Spanish survey of the land; and when that power was finally

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exercised, and the patent of 1852 to Brazeau was issued, the decision was final, and cannot be reviewed by any executive authority—*West v. Cochran*, 17 How. 412-17; *Magwire v. Tyler*, 1 Black, 195; *Mitchell v. Handfield*, 33 Mo. 438; *Lytle v. Arkansas*, 9 How. 314; *Haile v. Gaines*, 22 How. 144; *Bernard v. Ashley*, 18 How. 43; *Cunningham v. Ashley*, 14 How. 377.

In such a case, the title under the confirmation to Brazeau has absolutely passed by the patent, and neither the Commissioner of the General Land Office nor the Secretary of the Interior have any power to recall the patent, or annul the act of his predecessor, or divest the title. *Lott v. Prudhomme*, 3 Rob. (La.) 293, and *U. States v. Stone*, 2 Wall. 535, hold: "But one officer of the Land Office is not competent to annul or cancel the act of his predecessor. This is a judicial act, and requires the judgment of a court."

"The decisions of a ministerial officer may be inquired into in a court of justice, and nowhere else. Congress itself is incompetent under the Constitution to destroy the vested right and title of a purchaser of the public lands"—*Jourdan v. Barrett*, 13 La. 43-4.

"The United States having parted with its title by a patent legally issued, and upon surveys legally made by itself and approved by the proper department, can never impair the title so granted by any subsequent survey or grant. The United States in such case is no longer the owner—*Cage v. Danks*, 13 Ann. La. R. 128; *West v. Cochran*, 17 How. 412; *Magwire v. Tyler*, 1 Black, 198.

*B.*—The plaintiff sold and conveyed the land within the said patent of 1852, in favor of Brazeau's representatives, to Louis V. Bogy by deed, and is thereby estopped from claiming the land under the same confirmation in another place. (See deed of John Magwire to Louis V. Bogy.)

To this same effect the Supreme Court of Missouri has decided in *Magwire v. Vice*, 20 Mo. 429; *Magwire v. Tyler*, 25 Mo. 433, and S. C. 30 Mo. 202.

The Supreme Court of the United States has held, upon

this identical title, to the same effect in the cases of *West v. Cochran*, 17 How. 412-17, and *Magwire v. Tyler*, 1 Black, 198; see also *Burgess v. Gray*, 16 How. 48, 65, and *Stanford v. Taylor*, 18 How.

*C.*—The title to the sixteen arpents of land at the foot of the Big mound, included in the patent to Brazeau of 1852, must be divested before the court can locate the same confirmation within the Soulard survey. Two titles to two different tracts of land cannot emanate under the same confirmation.

*D.*—The only title papers from Joseph Brazeau for the reservation are the deed from Brazeau to Labeaume of 1798, creating the reservation, and the deed of Brazeau to Chouteau of 1816, conveying the reservation. Under these deeds the Brazeau reservation cannot be located at any other place than at the foot of the Big mound, where the U. S. survey and patent of 1852 fix it. By the deed of 1798 Brazeau conveyed the whole of his grant of four by twenty arpents of land to Labeaume, and reserved for himself "four arpents of land, to be taken at the foot of the mound, in the south part of said land." Brazeau had a limekiln on this reservation, about two arpents south of Labeaume's stockade, and Brazeau had cultivated up to the foot of the mound.—4 Crui. Dig. by Greenl. 271-3; 2 Hill. on Real Prop. 352, §§ 134-7.

The decisions of the Supreme Court of the United States in *West v. Cochran* and *Magwire v. Tyler*, on this same title, adjudge this reservation to be located at the foot of the mound. In *Magwire v. Tyler*, 1 Black, 199, the Land Court found as a fact that the Brazeau reservation was located south of Labeaume's patent, at the foot of the Big mound, and the Supreme Court of the United States so expressly declares the fact to be on pp. 198-9.

The deed of Brazeau to Chouteau of 1816 does not convey any land within Soulard's survey for Labeaume, and the plaintiff has not produced any other title paper from Brazeau; so that if there were any equity outstanding in favor of Brazeau for any land not described in this deed, the plain-

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tiff has not shown any transfer of it from Brazeau. If Brazeau had acquired any land in Soulard's survey by the confirmation of 1810, he has never conveyed it to any one, and plaintiff has no title to it.

IV. The assent of the United States to the passage of the title for the whole of Soulard's survey is evidenced by the confirmation of 1810 and by the patent of 1852 to Louis Labeaume, whose actual possession in 1800 and in 1803 was proved up before the Board of Commissioners, under a claim filed by Labeaume on 26th February, 1806. This evidence, by the patent issued in conformity with the acts of 1805 and 1807, is conclusive upon all parties, in all courts, as against all other inchoate claims for title to the same land. All these claims in favor of Brazeau or other persons became extinguished by the issue of the patent to Labeaume and have no standing in court, and no other person than the grantee, under the said acts of Congress, can be held by a court of justice to be entitled to the land—*West v. Cochran*, 17 How. 413, 417; *LeBois v. Brammell*, 4 How. 449, 461; *Landes v. Brant*, 10 How. 348, 370; *Magwire v. Tyler*, 1 Black, 195, 199; *Haile v. Gaines*, 22 How. 144, 160; *Lafayette's Heirs v. Kenton*, 18 How. 197; *Bissell v. Penrose*, 8 How. 317; *Chouteau v. Eckhart*, 2 How. 344; *Strother v. Lucas*, 12 Pet. 410; *Bissell v. Penrose*, 8 How. 344; *Menard v. Massey*, 8 How. 306.

V. The inchoate claim of Brazeau never had any standing in court as against the Labeaume confirmation under the Soulard survey.

Brazeau had no legal confirmation under the acts of Congress of 1805, '6, or '7, under which the confirmation to him purports to have been made, for the reason that no notice of his claim was filed by him according to the requirements of said acts of Congress, so as to give the Board of Commissioners jurisdiction of his claim. The Board of Commissioners of Missouri possessed only such powers as were conferred upon it by acts of Congress of March 2, 1805, February 25, 1806, and March 3, 1807. The first of these acts created

the board, prescribed its duties and jurisdiction, and the others only extended that jurisdiction to certain classes of cases that might be filed during the time as extended. By the 4th section of the act of 1805, 2d vol. L. & B. ed., p. 326, each claimant "shall, before the 1st day of March, 1806, deliver to the Register or Recorder of land titles, within whose district the land may be, a notice in writing, stating the nature and extent of his claim, together with a plat of the tract claimed; and shall deliver to the Register or Recorder, for the purpose of having the same recorded, every grant, order of survey, deed, conveyance, or other written evidence of his claim," &c.

This notice of claim had to be filed, together with the documentary evidence of title, before the 1st March, 1806, which time was afterwards extended, as to certain claims, until the 1st July, 1808; and it was further enacted, that "if any person should fail to deliver such notice, or cause to be recorded such written evidence of his claim, 'all his rights' under the act should be void and forever barred"; and that no incomplete grants, warrants, deeds, &c., which were not so recorded, should ever be admitted as evidence in any court of the United States against any grant derived from the United States.

This grant to Brazeau was incomplete. The Board of Commissioners was a court of special and limited jurisdiction, not acting under a common law jurisdiction, but in pursuance of a statute of the United States. After the claims were thus filed and recorded, the board was authorized to act upon them, and not before. The 5th section of the act of 1805 confers the only power possessed by the board, in the following words: "To decide in a summary way, according to justice and equity, on all claims filed with the Register or Recorder in conformity with the provisions of this act," &c.

The power of the Board of Commissioners did not extend to all land in Louisiana or Missouri, nor could the board confirm lands except in accordance with law—2 How. 374; U. States v. Percheman, 7 Pet. 85, 90, and cases cited above.



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Congress did not create this board for the purpose of making donations of land, but merely vested in it power to act on claims to land under incomplete grants, warrants of survey, and settlement rights, originating under the Spanish Government, which were actually presented, filed and recorded, and accompanied by a written statement of the claim, signed by the claimant, showing its nature and extent, and to be prosecuted afterwards by producing before the board evidence of actual possession in October, 1800, or on the 20th December, 1803, or for ten years prior thereto. The board had no more power to confirm land not claimed before it, according to the requirements of the statute, than a court of justice would have to enter up a judgment without any party before the court, without a writ or appearance. Such a judgment would be a nullity; and so an act of the board, confirming land to a man who is not a claimant, who has not filed any notice, or made any proof of possession, in accordance with the statute, is a mere nullity.

The jurisdiction that might be presumed in favor of the validity of judgments rendered in a court of common-law jurisdiction, will not be presumed in favor of special statutory courts. A court constituted as this Board of Commissioners was, and created for a special purpose, has no common law intendment in favor of its jurisdiction, but the facts necessary to show its jurisdiction under the acts of Congress must appear upon the record of the judgment of the board rendered by the board in the particular case.—*Wilcox v. Jackson*, 13 Pet. 449.

In *Chouteau v. Eckhart*, 2 How. 374, the court held that "the Board of Commissioners had no capacity to grant, but only to ascertain facts and report their opinions," and that "their power to examine did not extend to every description of claim."

These principles apply with peculiar force to the case at bar. Brazeau failed to deliver any notice of claim, or to do any act required by law, in order to procure a confirmation or give the board jurisdiction of his claim. The reason why

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he failed to do so is apparent from the record in this cause; for Brazeau prior to May 9, 1798, sold all his interest in the reservation, by a verbal sale, to Pierre Chouteau (see the deed from Brazeau to Chouteau of 1816), and this verbal sale passed Brazeau's title and claim under the Spanish law to Chouteau—10 Mo. 260; 4 Mart. (N. S.) 567; 7 Mart. (N. S.) 315; 3 La. 114.

Labeaume duly presented his notice to the Recorder, claiming, according to his Spanish survey, all the land within it, and filed the documentary evidence of his title with said Spanish survey, and had them duly recorded, thus complying with the law, and placing his claim before the board which was confirmed to him as defined by the Spanish survey of Soulard.

In the case of Strother v. Lucas, 6 Pet. 771-2, it was held that notice of the nature and extent of the claim must be filed, together with all the written evidence of the claim, and all persons neglecting to do so are forever barred. See also Strother v. Lucas, 12 Pet. 453-4, 458, and Bissell v. Penrose, 8 How. (U. S.) 333, 338. Brazeau never filed any claim before the board, and he had no claim for this land to file.

The act of 1805, § 1, authorizes confirmations to inhabitants who cultivated and possessed tracts of land on the 1st October, 1800. By § 2, the head of a family, 21 years of age, who had made an actual settlement on a tract of land, with the permission of the proper officer, &c., and who actually inhabited and cultivated the tract on the 20th December, 1803, might be confirmed. The act of 1807 authorizes, by § 2, a confirmation to be made to any resident of Orleans or Louisiana who had been in possession of a tract of land ten consecutive years prior to the 20th December, 1803.

Brazeau had no possession to support a confirmation under these acts of Congress, and he had no estate upon which the confirmation could operate. He had sold all his interest in the reservation to Pierre Chouteau before 1798, and the court below, in the former case of Magwire v. Tyler, 30 Mo., has found as a fact that Labeaume and his grantees have

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been in possession of the premises within the confirmation and patent to him from 1798 to this day—Magwire v. Tyler, 1 Black, (U. S.)

VI. The plaintiff is barred by the statute of limitations and by the lapse of time.

The title having passed from the United States to Louis Labeaume on 26th February, 1806, and the said Labeaume and the defendants claiming under him having been in possession of the land from 1806 to 1862, when this suit was brought, the plaintiff cannot recover.

1. The title passed to Labeaume on the 26th of February, 1806—West v. Cochran, 17 How. 413; Landes v. Brant, 10 How.; Mitchell v. Handfield, 33 Mo.

2. The possession of Labeaume and his grantees was open, notorious, and adverse to all persons, from 1806 until 1862.

The commencement of various suits by the plaintiff for this land does not prevent the running of the statute of limitations. Each suit commenced by plaintiff before or since 1851, has either been dismissed, or the plaintiff has suffered a verdict against him.

The possession for ten years prior to the 18th September, 1862, vests a perfect title in the defendants to the land—Biddle v. Mellon, 13 Mo. 335; Blair v. Smith, 16 Mo. 273; McNair v. Lot, 34 Mo. 300; Bollinger v. Chouteau, 20 Mo. 89; Keeton v. Keeton, 20 Mo. 530; Lucas act of 1847.

William Chambers, William Christy and Thomas Wright were innocent purchasers, without notice of any equities in favor of Brazeau, and for full value, before any U. S. survey had been made of the confirmation to Labeaume. In such a case the purchasers are protected against all pre-existing equities—LeNeve v. LeNeve, 2 W. & T. Lea. Cas. 116, 120, Am. ed.; Boggs v. Varner, 6 W. & S. 469; French v. Loyal Co. 5 Leigh. 627; Crockett v. Maguire, 20 Mo. 34; Lodge v. Simonton, 2 Penn. 439; White v. Carpenter, 2 Pai. 217, 253; Connecticut v. Bradish, 14 Mass. 291; Goundie v. Northampton Water Co., 7 Barr. 233; and McNair v. Lot, 34 Mo. 300-2.

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The innocent purchasers for full value came into possession in 1816, and after they and their representatives have held for forty-six years, under warranty deeds conveying the land by a well known ambit, the plaintiff has filed this bill to correct the alleged mistake in Soulard's survey of 1799, and in the confirmation of 1810.

The plaintiff is barred of this relief by the great lapse of time. The land then was of no value; now it is worth five hundred thousand dollars. After more than half a century from the settlement of the original locations by the Spanish Government, with the consent of Chouteau and Labeaume, in the presence of Soulard, in 1799 and in 1803, on the ground, and after coterminous possessions by a boundary line for fifty years, and an adverse possession by innocent purchasers for forty-six years, it is too late to correct the alleged mistakes of 1799 and 1810—*Piatt v. Vattier et al.*, 9 Pet. 416; *Smith v. Clay*, 3 Bro. Ch. 640; *Kane v. Bloodgood*, 7 Johns. Ch. 93; *Decouch v. Saratier*, 3 Johns. Ch. R. 190; *Prevost v. Gratz*, 6 Wheat. 481; *Hughes v. Edwards*, 9 Wheat. 489; *Wilson v. Matthews*, 3 Pet. 41; and the late case of *Badger v. Badger*, 2 Wal. (U. S.) 87.

All the witnesses who could speak of the transactions in 1799, or 1810, are dead, and it is not competent for the court to pass upon the transactions of the last century—*Johnson v. Johnson*, 5 Ala. 97, N. S.; *Atkinson v. Robinson*, 9 La. 396; *Pye v. Jenkins*, 12 Pet. 254; *Bowman v. Wattle*, 1 How. 193; 2 Sch. & Lefroy, 636; 17 Ves. 87; *Mitchell v. Thompson*, 1 McLean, 106; *Crane v. Prather*, 4 J. J. Marsh, 77; *Picot v. Page*, 26 Mo. 413; 4 Yerg. 97; 6 Yerg. 73.

Where an action at law would be barred, relief will be refused in equity—*Miller v. McIntyre*, 6 Pet. 67; *Hunt v. Wickliffe*, 2 Pet. 212; *Peyton v. Smith*, 5 Pet. 493-4.

*Glover and Krum, Decker & Krum*, for respondents.

I. The 16 arpents now claimed and now sued for were confirmed to Brazeau out of a claim of Louis Labeaume for 374 arpents, claimed by virtue of Soulard's survey for Labeaume,

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dated April 10, 1799. The Board gave to Brazeau this confirmation of 16 arpents out of Soulard's survey for Labeaume; they could give it out of nothing else; there was no other claim before them.

The act of Congress conferring jurisdiction on the board forbid the board to confirm any land not embraced in Labeaume's claim. See the "Act for ascertaining, &c., titles and claims to land," approved March 2, 1805; 2 U. S. Stat. at large, pp. 324 & 327; "An act respecting claims to land in the Territory of Orleans and Louisiana," 2 U. S. Stat. at large, pp. 440-1.

If the confirmation to Labeaume for 356 arpents gave him a title of any sort to so much land, the confirmation for Brazeau for 4 arpents to him gave him the same sort of title. So far the titles are equal. But of what derivation? Whence does the title to the 4 arpents spring? Why, it comes out of the identical 364 arpents asked for by Labeaume in his petition for extension. The Labeaume claim is, by the board, fixed and valued at 360 arpents. Now of these 360 arpents (that being emphatically the claim of Labeaume as adjudged by the board) they gave Labeaume 356 arpents, and 4 by 4 arpents to Brazeau. Are those 4 by 4 arpents part of the 360? Of course they are. Then where did they come from? Why, from the very essence and substance of Labeaume's petition and Labeaume's survey. Nothing can be plainer. The court may be supposed to use to Mr. Labeaume this language: "Here, Mr. Labeaume, your claim was good for 360 arpents, but it has embraced Brazeau's 4×4 arpents; therefore we will deduct that from it—we will take them out of your 360 arpents."

If the 4×4 arpents were carved out of the 360 arpents because they had been included in them by Soulard's survey of Labeaume's extension, then it only remains to ascertain what effect the confirmation had. The 4×4 are somewhere inside of Soulard's survey; but what right did Brazeau get by the confirmation? We answer, he got an equitable title.

In *Strother v. Lucas*, 7 Pet. 769, it was held that a con-

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firmation without a patent is an equitable right. The confirmation was conclusive only of the equitable right—*Burgess v. Gray*, 16 How. 63, 48.

The confirmation to Brazeau by the Commissioners was the adjudication of a "good title" to 4×4 arpents, reserved in his sale, to be located by survey—*West v. Cochran*, 17 How. 415. The same is held in *Magwire v. Tyler*, 1 Black, 195, where it is said Brazeau's reservation was 4×4 arpents, and his confirmation was for 4×4 arpents.

If Brazeau had any equity to the land in dispute, the granting of a patent and survey to another party cannot destroy his right—8 Mo. 94; 2 Bibb, 484; 6 B. Mon. 290; *Bagnall v. Broderick*, 13 Pet. 450; Pet. Cir. Ct. 496; *Stephenson v. Smith*, 7 Mo. 610; 1 Pet. 212; 9 Mo. 586–592; *Huntsucker v. Clark*, 12 Mo. 333; 18 How. (U. S.) 87, 44; 24 Mo. 132; 5 Rand. 479; *Bodley et al. v. Taylor*, 5 Cranch, 191; *Taylor et al. v. Brown*, 5 Cranch, 252; U. S. v. *Hughes*, 11 How. 567.

Surveys must be legally made—*Brown v. Clements*, 3 How. 650; *Robinson v. Campbell*, 3 Wheat. 212; *Perry v. O'Hanlon*, 11 Mo. 585.

Illegal acts of officers are not binding on parties—*Groom v. Hill*, 9 Mo. 322; 10 Mo. 763; 21 How. 228, 294; 11 Mart. 212; 20 How. (U. S.) 8; 5 How. (U. S.) 328; 5 Cra. 591.

In *Hill v. Miller*, 36 Mo. 97, *Wagner, J.*, said: "Where a patentee obtains his patent by fraud, and with notice of an existing prior equity, he will be held trustee for the person equitably entitled." In May, 1862, Brazeau's claim was surveyed, meted out, and bounded inside of the claim of Labeaume—inside of the 360 arpents tract decided to constitute Labeaume's real extent of land, and in the same year patented to Brazeau's representatives. This survey was approved May 8, 1862; the patent was issued June 10, 1862. This survey and patent have opened the door to Brazeau's representatives to litigate the merits of their claim in the courts. In 1852 the Land Department at Washington had Brazeau's confirmation surveyed at the foot of the mound,



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and patented there. The plaintiff never applied for such a survey, but protested against its being made there, and refused to accept the survey or patent certificate, and has ever refused to receive the patent. It would be very unjust to hold that, under such circumstances, the plaintiff is bound by these title papers; no law is produced showing he is.

II. The case is now presented of two surveys and two patents covering the same land, and the question arises, how shall the conflicting pretensions of the parties be disposed of? We insist that all natural and legal equities pertaining to the claims shall be considered. Every government survey is *prima facie* correct; but this rule can never settle this controversy. You are compelled to look behind and into the whole history of the case as soon as two surveys appear—McGill v. Somers, 15 Mo. 80; 8 Mart. 727.

See Bagnall v. Broderick, 13 Pet. 450; Berthold v. McDonald, 24 Mo. 126; Bryan v. Forsythe, 19 How. 337. In this last case a patent was issued subject to the right of third persons; afterwards the claim of a third person was surveyed within the patent, and it was held that the last survey controlled the prior patent. In such case, the patents which conflict are only *prima facie* evidence of title in the patentee. To the same effect, see 8 How. 317; 22 How. 339; 9 How. 421. It must be observed that in this case the defendants have no confirmation for the 16 arpents of land claimed by Brazeau. They have no equitable title to those 16 arpents; their confirmation was for other land, 356 arpents, all which they have received. Brazeau had no confirmation for any land confirmed to the defendants. There are no conflicting confirmations in the case. The conflict simply arises from the defendants procuring a survey and patent for Brazeau's confirmation. This is the fraud complained of. Labeaume seized and held what was not his own. Brazeau's right was established by the confirmation as valid (17 How. 403; 1 Black, 199); but until Brazeau had a survey he could not sue. No wrong was done Labeaume by Brazeau's survey. The survey now is of no other value to

him than to enable him to sue; he must show his right to recover independent of the survey. The new survey for Brazeau simply affords a remedy.

The power to issue the new survey is not to be questioned. The case of *Cochran v. West*, 17 How. 415, is conclusive. The survey of 1817 located the land of Brazeau above the ditch. Chambers assented to it as agent of Labeaume's assignees. All parties assented to it. It remained untouched down to 1848, over thirty years. No appeal was taken from it by any interested party, no clamor made against it until 1847; yet it was set aside by Mr. Stuart in 1852, at the end of thirty-five years, and the 16 arpents ( $4 \times 4$ ) of Brazeau patented to Labeaume's representatives.

The power to recall a survey for Labeaume is the power to recall one for Brazeau. As to the Brazeau patent, it was never accepted any more than the survey, and was recalled by the act of the Government; there was no need of cancelling it. It could not have been cancelled, because nobody named in it as grantee ever claimed it. Nobody ever set it up. It was refused from the first. It was a mere mistake, an error, never fully consummated; and in this condition was corrected, annulled, recalled, set aside—*Magwire v. Tyler*, 1 Black, 195.

Magwire protested against the location and contested it, asserting that his land was above the ditch; and he prosecuted his claim before the department to a re-survey and location until it was granted in 1862. A patent is a mere ministerial act; it is furnished by the United States when sealed. But if the defendant refuses it, the title does not pass. The Government may have done all it could to pass the title by sealing the patent; but the defendants did not accept, and the title did not pass—*Stoddard v. Chambers*, 2 How. 318. A patent issued against law is void.

III. All the equities in favor of Brazeau were secured by the form of Labeaume's patent. The patent did not purport to convey the land to Labeaume's representatives absolutely, but saved the rights of others. The words are, "saving and

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reserving any valid adverse rights which may exist to any part thereof."

The plaintiff could not maintain ejectment in the condition of the titles—*Stringer et al. v. Young*, 3 Pet. 320 ; 4 How. 462.

It does not appear that the Supreme Court of Missouri has adopted the rule that the junior patent with the elder equity will maintain ejectment against the elder patent, save in respect to New Madrid claims. This is one ground of plaintiff's equity ; another, is the cloud on plaintiff's title which the petition seeks to remove. In a conflict between parties on patented claims, when the courts go behind the patents, the patents do not aid the equity ; each must stand on its merits equitably, independent of the patents—*Le Bois v. Brammell*, 4 How. 462.

If any doubt exists as to the powers of the Land Department to survey the 4×4 for Brazeau, "An act for the survey of grants and claims to land," approved June 2, 1862, removes it—*Sess. Acts of Cong. 1862*, p. 410.

The survey in the case was finished May 1, 1862, but was not patented till June 10, 1862. The approbation of the survey by issuing a patent on it June 10, 1862, is an effective survey under the law. In 2 How. 318, it was held, that although a survey may not have been within the provisions of a law when made, yet if the patent on it issued within the provisions of the law, the title would vest—23 Mo. 100 ; 14 Mo. 585 ; *Mills v. Stoddard*, 8 How. 345-6. How could the patent on this survey be refused on the 10th June, 1862 ? The department was obliged to treat the survey as valid under the act of Congress of June 2, 1862.

IV. There is no plea in the answer such as is necessary to set up the defence of innocent purchaser without notice—*Halsa v. Halsa*, 8 Mo. 307-9 ; *Boone v. Chiles*, 10 Pet. 211. The patent was issued to Labeaume in 1852 ; until then the defendants had no legal title. This defence is never allowed in favor of the purchaser of an equitable title. The idea that defendants had no notice is untenable under the evidence in

the cause. Christy, Wright and Chambers concede in their deed the doubtful title to the 16 arpents. See their deed, May 4, 1816, book M, p. 34, and covenant for recovery on Labeaume. No improvements of any value, even to this day, were ever put upon the land.

The plaintiff purchased the 16 arpents at a public sale by Strother's administrator, in May, 1846, and afterwards obtained the title of the Marine Railway Company. He entered upon the land in September, 1846, and erected a boat-yard, and was carrying on the business of building steamboat hulls, and had a saw-mill on the ground which was burnt down.

V. The plaintiff never had any title upon which an action would lie until the commencement of the present suit—8 Wheat. 421; 10 How. 174; 10 Pet. 176; 9 Pet. 86; 7 Pet. 252; 8 Mo. 303; 17 How. 415; 1 Black, 199. This survey and patent for the land in dispute had not issued at the commencement of any suit heretofore brought by him.

Of course, the same title now in issue was never in issue and could never have been adjudicated in any former suit.

VI. The defendants have raised, in argument, a fifth point—that Brazeau's claim was lost by prescription prior to 1810.

To this there are several answers. 1. No action would lie on the claim till confirmed by the United States, it being an incomplete grant, and it could not be barred till plaintiff could sue. 2. No action would lie, certainly, till after the confirmation; that has been the course of decisions in every suit brought by the plaintiff. 3. There is no proof of any adverse possession by any one, prior to 1810, of the 4×4 arpents above the ditch. 4. M. L. Clark testifies that Christy did not enclose the 4×4 in his fences, but left them out; so Brazeau had no cause of action.

The confirmation of Brazeau to the 4×4 arpents is conclusive of his title at the time it was made.

In no event will this court reverse the finding on the evidence by the Circuit, as the evidence of location well justifies the finding below.

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HOLMES, Judge, delivered the opinion of the court.

This is a suit in the nature of a bill in equity, filed in the St. Louis Land Court, in 1862, and removed by change of venue to the St. Louis Court of Common Pleas, praying the court to divest out of the defendants all the right, title and interest acquired by them in the tract of land therein described, and to vest the same in the plaintiff, and put him in possession; and that an account might be taken of the rents and profits.

The petition sets forth the history of the plaintiff's title from its origin under the Spanish Government to its final completion in a patent from the United States in 1862.

The answer, in like manner, states the main facts in the history of the defendants' title from its origin under the former government to its final perfection in a patent, in 1852. Both patents include the land in controversy.

The grounds of equity stated in the petition are essentially these: 1. That the plaintiff has the better equity, and that the land justly belongs to him; 2. That there was fraud on the part of the defendants, or their ancestors, in procuring a survey and patent to them for this land; and 3. That the defendants' patent is a cloud upon his better title; of all which the defendants had notice.

The answer denies these equities, and claims that defendants have the prior title and better equity; pleads in bar a final decree in chancery in a former suit between the same parties, upon the same identical equities, and insists that the plaintiff's suit is barred by the great lapse of time.

The plaintiff obtained a decree that the title to said tract of land be divested out of the defendants and vested in the plaintiff and his heirs, and for rents and profits amounting to some \$20,000, and the case comes up by appeal. The whole cause may be determined on a few essential points, without any necessity that we should discuss at large the immense array of facts and matters which are accumulated in the record, and which have been made the subject of elaborate argument on both sides, and been fully consid-

ered by the court. There are two patents for the same land; on the patents only there can be no question but that the elder patent conveys the absolute title from the United States, and consequently, if there were nothing more, the junior patent must be ineffectual and void for the reason that the grantor at the date of the patent was not the owner of the land, and had nothing to convey—*Polk's Lessees v. Wendell*, 9 Cranch, 79; *Stoddard v. Chambers*, 2 How. (U. S.) 318. The plaintiff, therefore, must claim, (as he does,) to go behind the patent into the history of the respective titles, in order to gain a prior or a better equity. The patents, respectively, relate back to the first or inception act, in the series of concurrent acts, which are necessary under the laws of the United States to complete the conveyance. It has been decided and may be considered as settled, that, under the acts of Congress on which these titles depend, the patent relates to the date of the filing of the claim—*Landes v. Brant*, 10 How. (U. S.) 373; *Mitchell v. Handfield*, 33 Mo. 438. Under this rule the defendants' elder patent relates to the 26th day of February, 1806, (when Labeaume filed his claim,) and vests an absolute title as of that date.

The plaintiff's junior patent cannot relate to any date prior to that of the confirmation of Brazeau, on the 22d day of September, 1810, for the reason that the record furnishes no evidence of an earlier date than that for the filing of his claim. On that day the Board of Commissioners takes notice of his claim and confirms it.

It does not appear that any claim had been filed or presented to the board, nor that any evidence of claim had been recorded, at any named date, in the name of Brazeau. If we could presume upon the facts of a confirmation appearing of that date, that all prior acts had been rightly done, there would still be no earlier date of the first act, to which the patent could be made to relate. The confirmation stands alone as the only inception act to which the fiction of relation can be applied in favor of this claim.

These first acts are the earliest equities that exist in favor



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of the parties, and against the Government, of which a court of justice can take notice. They are the inception of the titles, as emanating from the United States. Prior to such inception there existed nothing but the unconfirmed claim or inchoate Spanish title by concession or survey; and this was nothing more than an equity addressed to the political power under the obligation of the treaty. It has uniformly been held that where two conflicting equities of this nature have been acted upon by the Government, and one of them recognized to the exclusion of the other, there was an end of the matter in the courts of law or in equity. The decision of the Government is conclusive respecting the comparative merits of such inchoate claims. So far, then, the defendants have the prior title and the superior equity. There is no evidence in the record, other than the confirmation (and the certificate following upon it), that either Brazeau or Chouteau, his assignee, had made any claim before the board.

The Commissioners appear to have acted upon the evidences which were filed and produced by Labeaume in support of his own claim. They confirmed the claim of Labeaume upon those evidences, among which were a concession, a recorded Spanish survey, and proofs of an actual possession under them for many years, and the confirmation was to be surveyed mainly upon the *data* given in those evidences.

At the same time they confirmed "the four arpents" to Brazeau, agreeably to his reservation in the deed to Labeaume (which, together with the petition and concession to Brazeau of the tract of four by twenty arpents, was before them), and upon no other evidence that appears; and this confirmation was to be located and surveyed upon the evidences of the reservation as made.

There is nothing to show that the board thought of confirming the same land to both parties. They had no power to do so. If the claims had been made for the same land, or conflicting evidences of right, it would have been their func-

tion, and their duty, to decide between them, and to confirm the one, and reject the other. This was certainly not done; they confirmed both. Now, that the claim of Labeaume, upon the evidence produced by him, included this land, there would seem to be no room for any rational doubt. The only evidence before the board relating to the claim of Brazeau, was the petition, concession and deed of Brazeau, which Labeaume had filed as a part of his own evidence, conveying to him the sixteen arpents of the length of the concession to Brazeau, in which deed only the reservation by Brazeau was mentioned, to consist of four arpents of the twenty in length of the whole concession, "to be taken at the foot of the hillock in the southern part of said land," which land, according to the petition, was "situate beyond the foot of the mound," and was to begin at the "foot of the hill" on which the mound stood, and by the concession was to "begin beyond the mound" and extend "north north-west to the environs of Rocky branch," and of which an end was to be bounded by the concession of Esther, which had no more fixed and definite location than had the concession to Brazeau.

It appears that the land thus reserved was sold by Brazeau to Chouteau. Neither Brazeau nor Chouteau had any possession of any land within the area of Labeaume's claim, as presented and confirmed. No evidence of the sale to Chouteau, nor any survey, or possession, or claim of either of them, appears to have been filed by anybody, nor produced before the board, in support of a claim for Brazeau. There is no reliable evidence whatever that the board intended to confirm to Brazeau any land within the area of Labeaume's claim and possession. His claim was evidently confirmed to be surveyed elsewhere. Therefore, even if relation were to be had for both patents to the date of confirmations only, thus making them equal in time, the plaintiff could gain nothing in respect of any superior inceptive equity to this land.

The defendants still hold that ancient possession as before,

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and there would be no ground here, either at law or in equity, on which the plaintiff could be entitled to relief now, to the dispossession of the defendants.

Both claims were confirmed to be surveyed. The plaintiff proceeds upon the theory, not that the same land was confirmed to both claimants, but that the four by four arpents were confirmed to Brazeau to be surveyed out of Labeaume's claim, and within the area of Soulard's survey, and that only the remainder of the claim was confirmed to Labeaume. This whole matter becomes, essentially, a question of the location of the confirmations which were made to be located by survey on the evidences relating to them respectively. Labeaume's asserted claim was confirmed to him, though the entry in the proceedings of the board names a different number of arpents as the contents. The reservation of Brazeau was confirmed to him.

It necessarily follows, that, if the confirmation to Brazeau is to fall upon the same land as that of Labeaume, it must be the result of location and survey.

The larger part of the proofs, and much of the argument was directed to this subject, and really to the question of the true location of the reservation made by Brazeau; and though not deemed absolutely necessary for the decision of the cause, it may be proper to say, that we are impressed with the justness of the conclusion of Napton, J., in *Magwire v. Tyler*, 25 Mo. 433, that this whole controversy "is purely one of locality"; that "pursuing it through all its ramifications, and looking at it in all its diversified shapes, it still resolves itself into this, and nothing else," and that "the United States Surveyor is alone to determine this question," subject only to the revision of his superior officers of the Land Office. Now the head of the Land Department had first finally determined this question in favor of the defendants, and given them the survey on which the elder patent issued, and that survey has never been set aside or annulled, nor can it ever be annulled—*United States v. Stone*, 2 Wal. (U. S.) 525.

We concur also in the opinion of Mr. Justice Catron, in *West v. Cochran*, 17 How. (U. S.) 411, that the entry of the confirmation of Brazeau in the records of the board "is so confused as to be unmeaning without reference to the title papers of the record," and also, (as we may add,) to the deed from Brazeau to Chouteau (which was not before the board), in which Brazeau himself recites more distinctly what land he had intended by that reservation.

We agree also with his opinion in *Magwire v. Tyler*, 1 Black. 199, that this confirmation to Brazeau (if ever to be surveyed at all) was to be surveyed "conformably to the reservation," and that "that reservation was at the foot of the mound." No competent surveyor, we think, could properly locate it otherwise than in conformity with this fixed land mark and controlling call. Nor could any competent surveyor, upon the whole given *data* relating to the location and boundaries of the confirmation to Labeaume, properly survey it, otherwise than so as to exclude the Brazeau reservation from within the limits of his claim, as actually possessed under the Spanish survey, and as presented to the board and finally confirmed.

But the executive officers have settled this matter of the location and it is no longer open to judicial inquiry; nor, if it would be considered open under any special circumstances (of which no supposable example occurs to us) for a consideration of equities, have we found any satisfactory evidence of a superior equity in this matter in favor of the plaintiff.

As bearing upon any supposed equity grounded upon fraud or mistake, a patient consideration of the whole history of the origin and progress of these titles has resulted in a thorough conviction, that all the fraud or mistake there has been concerning it, arose from the same "confused" entry, and that the idea of locating Brazeau's reservation within the area of Soulard's survey for Labeaume has never been anything else than an unfortunate blunder.

As regarding the inceptive rights to which the patents re-

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late, for the purpose of ascertaining the priority of title as between the two patents issued upon different inceptive equities, the whole matter falls within the jurisdiction of a court of law; and in that there is no need of invoking the aid of a court of equity—*Ross v. Barland's Less.* 1 Pet. 564; *Landes v. Brant*, 10 How. (U. S.) 373; *French v. Spencer*, 21 How. (U. S.) 228.

When the controversy has arisen between two conflicting inceptive rights only, before a patent has been issued to either party, or where one party stands on a prior inceptive equity, and the other on a junior equity and no patent, courts of equity have taken jurisdiction to protect the better equity, which had emanated from the Government. There are many cases of this kind concerning entries, pre-emption rights, and New Madrid locations, when the party stands in the position of a purchaser from the United States, for a valuable consideration paid. Even a right to have an entry by pre-emption where no money had, as yet, been actually paid, has been so protected as "a legal right" acquired under the acts of Congress. Such parties may be entitled to relief, against other persons than the Government itself, on the ground of fraud, or preventing a cloud upon a title, or multiplicity of suits, or injurious and unauthorized acts of public officers, or upon any other ground of ordinary chancery jurisdiction—*Garland v. Wynn*, 20 How (U. S.) 6; *Barnard v. Ashley*, 18 How. (U. S.) 44; *United States v. Hughes*, 11 How. (U. S.) 567; *Carroll v. Stafford*, 3 How. (U. S.) 441; *Bodley v. Taylor*, 5 Cranch, 191; *Taylor v. Brown*, 5 Cranch, 243; *Huntsucker v. Clark*, 12 Mo. 337; *Berthold v. McDonald*, 24 Mo. 131.

Courts of equity in this State exercise jurisdiction according to the principles of equity jurisprudence, excepting only as the same may have been modified by some special statute. Equities addressed to the political power do not fall within the scope of this jurisprudence any more than mere natural equities. There is really no case made on the record which can entitle the plaintiff to relief under any head of equity ju-

risdiction. The grounds of equity that are specially alleged in the petition consist, first, in a supposed priority of inceptive right; second, in the alleged fraud on the part of the defendants or their ancestors, which, so far as appears, consisted merely in a diligent prosecution of their claim before the several officers of the Land Department, resulting in a survey and patent to them for the land claimed, including the premises in dispute, in respect of which we find no proof of any fraud; and, third, in a supposed cloud upon the plaintiff's title, so created.

The matter of the inceptive right has already been sufficiently disposed of. The fraud alleged does not concern any contracts, relations, privities, obligations, trusts, agencies, or any transactions or conduct whatever, arising between the parties, respecting any right, title or property which had emanated from the United States, and in respect of which the plaintiff had acquired any prior or superior equity. Throughout the history of these claims the contending parties appear to have acted independently of each other, and pursued a separate struggle, to obtain the complete evidences of their respective titles, with conflicting pretensions, since the date of the confirmations, so far, at least, as any adverse claims to this same land have ever existed or been pretended. All such equities as may have existed in favor of either of the claimants under the former government and prior to the presentation of their claims for confirmation under the acts of Congress must be considered as merged and included in the equity or justice of the claims which were submitted to the action of the political power. And there is really no such thing in the case as what is meant in law by a cloud upon one's title. In one sense there is, indeed, a very heavy cloud, and not a cloud merely, but a thunderbolt of annihilation upon the opposing title.

Still further, this board had a limited and special jurisdiction only, and no more power than the act of Congress conferred upon them. They had power "to hear and decide, in a summary manner, all matters respecting such claims" as



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had been filed upon "notice in writing," and been possessed or surveyed as required by the act of Congress, and of which the evidences had been delivered to the Recorder "for the purpose of being recorded," and upon no other claims of this class—act of Cong. of Mar. 2, 1805, 2 U. S. Stat. 326; act of Cong. of Mar. 3, 1807, § 7.

In such case all the facts must appear which are necessary to give jurisdiction, and show that the tribunal had authority to act and determine. It appears that the board, *ex mero motu*, confirmed a claim for Brazeau, of which no notice in writing had been given, of which no possession nor survey had been proved, and of which the evidences had neither been filed nor recorded, and were not produced by any one in the name of Brazeau.

We must hold that they had no jurisdiction, no power to act upon such a claim, and that the confirmation to Brazeau was a nullity. The plaintiff's patent is therefore null and void both in its inception and its completion—Grignon's Less. v. Astor, 2 How. (U. S.) 341; Chouteau v. Eckhart, 2 How. (U. S.) 374; Bissell v. Penrose, 8 How. (U. S.) 338; Landes v. Perkins, 12 Mo. 255; Patterson v. Fagan, 37 Mo. 81.

The plaintiff's survey shares the fate of his title, and must fall with it, whether that title fails for the reason that the land had been previously surveyed and patented to another upon a prior inceptive right, or upon the ground that it was void in its inception. If the plaintiff had shown a foundation for equitable relief under any recognized head of equity jurisprudence, it would not matter whether he had the legal title to this land or not. One legal title is enough. In such case the court would decree the title to be conveyed to him or to be vested in him by decree. His equity alone would be his sufficient title to relief.

The former decree in chancery between these parties proceeded upon the same substantial facts and grounds of equity that are here alleged again. The only essential differences that are insisted upon now, are, that when the former cause was litigated, the official survey and patent had located the

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plaintiff's claims in another place, and that he has now a formal title, by patent to this land, which he did not have then. This may be true, but it cannot change his situation in reference to any equities upon which he might be entitled to relief. In this matter of the legal title, his complaint really concerns the priority of the title, or the action of the Government, over which the courts have no control. It has been shown that the plaintiff's patent is wholly inoperative and ineffectual, for the reason that the grantor did not own at the time any right, title or interest in the land on which it could have effect, even if not otherwise void; and further, that it is utterly void from its inception, for the reason that the confirmation was void; consequently, he has no more legal title now than he had at the date of the former suit. The equities are substantially the same as before, and the same matters were then adjudicated. The former decree is therefore a complete bar to this suit—*Parish v. Ferris*, 2 Black, 606; *Perine v. Dunn*, 4 J. Ch. 140; 2 Sto. Eq. Jur. § 1523.

The great lapse of time and the statute of limitations have been urged upon our consideration. On this it will be enough to say that the defence, resting upon a Spanish possession under a concession and recorded survey, and continued to the present time under an absolute title from the United States dated from the year 1806, needs no help, and could derive no additional strength against the plaintiff here from any statute or limitations.

The judgment will be reversed and the petition dismissed. The other judges concur.

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EDW'D J. SUGG, Respondent, v. THE MEMPHIS AND ST. LOUIS  
PACKET COMPANY, Appellant.

*Evidence—Carrier.*—In a suit against a carrier for the non-delivery of a trunk shipped, testimony to show what were the contents of the trunk at the time it was packed, some weeks before its delivery to the carrier, is admissible; although the carrier can only be held responsible for the contents of the trunk at the time of its receipt.

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*Appeal from St. Louis Circuit Court.*

The following instruction was given at the instance of the appellant :

"The jurors are instructed that the defendant, as a common carrier, is not presumed to know the contents or value of trunks shipped on its vessels, and that it is incumbent on the plaintiff to prove the contents and value thereof when it was delivered to defendant at Memphis at the time stated in the petition."

On the part of respondent the court gave the following instructions :

1. If the jury find for the plaintiff, they will assess the damages at the value of said trunk and its contents at the time it should have been delivered at St. Louis, to which they may add interest at the rate of six per cent. per annum.

2. If the jury find that the plaintiff shipped the trunk in question, as alleged, in the steamboat Belle Memphis, it is immaterial whether the contents of the trunk were the property of the plaintiff or not. It is no defence for the defendant to say that said goods belonged to some other person ; nor is the moral character of the plaintiff, or any other person involved, any defence for defendant.

3. It is admitted by the pleadings in this case that the defendant is a corporation engaged as a common carrier in the business of carrying goods and chattels from Memphis to St. Louis by means of the steamboat Belle Memphis, and that said boat was the property of and in the employ of defendant as such carrier.

4. If the jury find from the evidence that the plaintiff, at Memphis, by his agents, J. B. Scudder & Co., caused the trunk in question to be shipped in the steamboat Belle Memphis, and that the said boat received the same and gave its bill of lading therefor, and failed or neglected to deliver said trunk at St. Louis, they will find for plaintiff.

The appellant, at the close of plaintiff's evidence, offered an instruction in the nature of a demurrer to the evidence,

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that plaintiff could not recover except for the value of the trunk; which was overruled, and plaintiff excepted.

The following instruction asked by appellant was also overruled, and plaintiff excepted:

"The jurors are instructed to exclude from their consideration, in determining this case, all evidence (offered by the plaintiff, and admitted by the court, relating to the contents of the trunk) on the question when it was in St. Louis or Cairo prior to the time alleged in the petition to have been delivered to defendant at Memphis for transportation to St. Louis."

FAGG, Judge, delivered the opinion of the court.

The cause was tried in the St. Louis Circuit Court without the intervention of a jury, and a verdict and judgment were entered for the plaintiff, from which an appeal has been duly presented to this court.

It is only necessary to notice the declarations of law given and refused by the court for the purpose of arriving at the theory upon which the finding was made. The first instruction was asked by the defendant at the conclusion of the plaintiff's case, and was in the nature of a demurrer to the evidence. The plaintiff had attempted by the testimony to trace his property—consisting of a trunk and its contents—from the city of St. Louis to Cairo, Illinois, and thence to the city of Memphis, at which place it was alleged to have been re-shipped on one of defendant's boats, called "Belle Memphis," back to St. Louis again. The property was never delivered. The only proof of the contents of the trunk was the evidence of a witness who saw it packed at St. Louis some six or eight weeks before it came into the possession of defendant's agents on said boat. It is true that the liability of the defendant as a common carrier only attached at the time of the delivery of the trunk at Memphis. It could only be held responsible for the articles then contained in it. The proof should have tended to show what it contained at that time. But there is no particular formula of proof in such

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cases. It would be competent for the plaintiff to commence at any given period before the precise time at which the shipment was made and prove the contents of his trunk, and then by regular and competent proof show that it remained in the same condition and without change until the defendant took charge of it. Such a case might be made out just as satisfactorily in this way as in any other. Of course, the length of time intervening between the period at which the articles were placed in the trunk and the time of shipment on defendant's boat, together with all the facts and circumstances tending to show opportunities for abstracting them, might go very far towards weakening the force of such testimony. Still, if the trial had been by jury instead of the court, it would not have been proper to withdraw the case from them upon the proofs as then made.

The second instruction asked on the part of the defence stated the law correctly. From what has already been said, there was no inconsistency between this instruction and the finding of the court. It asserted that the defendant was only liable for the value of the articles in the trunk at the time of shipment. There was evidence tending to identify this as the same trunk that had been first packed in St. Louis and thence shipped to Cairo and Memphis. It is not the province of this court to weigh the evidence in the case. But however weak it may be considered, still there were facts proved from which its identity might be inferred, and from which its condition might be presumed to have remained unchanged.

Such cases always present some peculiarities. Even at common law the rigid rules of evidence were so far relaxed as to admit parties, *ex necessitate rei*, to testify as to the contents of their own trunks and boxes. This, of course, was never extended beyond what is recognized as baggage usually accompanying travellers, or such articles of personal apparel or property as might be exclusively within the knowledge and custody of the person putting them up for shipment, and out of the ordinary course of trade. All the

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authorities tend to establish the doctrine that in the trial of cases of this character there should be a great relaxation of the rules of law as to the proofs, and a wider range of inference permitted than in ordinary cases.

The court committed no error in refusing to make the declaration contained in the third instruction. What is said in reference to the third instruction will also apply with equal force to this.

It is shown that the court found the value of the several articles sued for to be the sum of seven hundred and four dollars, with interest thereon amounting to one hundred and six dollars. The whole amount for which judgment should have been entered so as to correspond with this finding, was therefore the sum of eight hundred and ten dollars. By mistake, or otherwise, judgment was entered up for nine hundred dollars. This error in amount will therefore be corrected by entering a judgment here for eight hundred and ten dollars.

The judgment of the court below, thus corrected, will be affirmed. The other judges concur.



LOUIS F. BOMPART *et als.*, Respondents, *v.* C. STUMPPF and JOHN VERTY, Appellants.

1. *Lands and Land Titles—Confirmation—Evidence.*—A certificate of confirmation issued by the Recorder of land titles under the act of Congress of May 26, 1824, on proof made of cultivation, inhabitation and possession prior to December 20, 1803, is *prima facie* evidence of title under the United States.
2. *Lands and Land Titles—Limitations—Practice.*—It is for the jury to determine whether and at what time a continuous, open, notorious and actual adverse possession of land sued for commenced or was actually taken by the defendants.

*Appeal from St. Louis Circuit Court.*

The court refused all the instructions asked by defendants, and gave the following:



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“If the jury believe from the evidence that the certificate of confirmation dated the 22d day of April, 1825, made by Theodore Hunt to François Duchouquette, and the will made by François Duchouquette in 1833 and the deed from Henry Bompert to William Prairy in 1848, are genuine, and that said confirmation, will and deed embrace the land in question, and that the plaintiffs are descendants of said Henry Bompert, then the plaintiffs have shown a *prima facie* title to said land, and must recover in this action, unless the jury are satisfied from the evidence in this cause that the defendants, or those under whom they claim, have had open, notorious, continuous and visible possession of said land, claiming the same as their own, against all persons whatsoever, for a period of ten years before the 14th day of November, 1859, in which case the defendants must have a verdict at your hands. But if the jury should find that such adverse possession was taken, and further find that at the time it was so taken either of the plaintiffs were under the age of twenty-one years, or a married woman, then the time during which they or either of them were under the age of twenty-one years, or a married woman, will not be deemed or taken as any portion of the said ten years. If the jury find for the plaintiffs, they will find the value of the rents and profits of the land down to the present time, and will further find the monthly value of the rents and profits.”

*Hill* and *Farish*, for appellants.

*Knox & Kellogg*, for respondents.

HOLMES, Judge, delivered the opinion of the court.

The plaintiffs showed title to the lot in controversy under a certificate of confirmation issued by the Recorder of land titles, dated April 22, 1825, to Francis Duchouquette, under the acts of Congress of the 13th of June, 1812, and the 26th of May, 1824, on proof made of inhabitation, cultivation or possession prior to the 20th day of December, 1803. There

is no question but this was a *prima facie* title from the United States.

The defendants showed no title, but relied upon an adverse possession under the statute of limitations.

The instruction which was given for the plaintiffs submitted the question of adverse possession fairly and wholly to the determination of the jury. It is objected that it admitted of cumulative disabilities. There is nothing contained in it that can bear this construction. It told the jury that if at the time when the adverse possession was taken, either of the plaintiffs was under the age of twenty-one years, or a married woman, then the time during which they or either of them were under that age, or a married woman, should not be deemed or taken as any portion of said ten years. It does not suppose that one disability is to be added to the other, nor admit of cumulative disabilities.

It was a matter for the jury to determine at what time a continuous, open, notorious, and actual adverse possession commenced, or was actually taken and held by the defendants. Upon the evidence before the jury, they might very well find that no such continuous adverse possession had been taken and held prior to 1849, and within the ten years next before the suit was commenced. The evidence made this an open question of fact, and the evidence offered by the defendants was of a character admitting of grave doubt, and by no means decisive or altogether satisfactory. We cannot say that either the plaintiffs' instruction, or the verdict, was not warranted by the evidence; and we find no ground on which we would be authorized to disturb the verdict.

The instructions refused for the defendants were for the most part upon matters immaterial to the issue, or they were substantially embraced in that which was given by the court. We have not found any error in their refusal of which the defendants have a right to complain.

The verdict would seem to have been clearly for the right party. Where a party rests entirely upon an adverse pos-

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session under the statute of limitations, having no shadow of title, he cannot complain if clear, unequivocal and decisive proof be required by the jury. We are inclined to think they have rendered a just verdict.

Judgment affirmed. The other judges concur.

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JOHN H. GARNHART, Respondent, v. JOHN FINNEY, Appellant.

1. *Landlord and Tenant—Waiver of Forfeiture—Rents.*—The acceptance of rent by the landlord after full notice or knowledge of the breach of condition for which a forfeiture might have been demanded, is a waiver of the forfeiture which cannot afterwards be asserted. To show a waiver and the determination of the landlord to disclaim the reversion and continue the lease, slight acts are sufficient, and any recognition of a tenancy as subsisting after the right of entry has accrued and the lessor has notice of the forfeiture will have the effect of a waiver. Where an estate in land has become subject to forfeiture by non-performance of conditions at the day, the forfeiture will be waived by accepting performance at a subsequent day, and the acceptance of the performance of a new and substituted agreement will have the same effect. A landlord having waived his right to declare a forfeiture, cannot afterwards refuse to comply with his covenants for a renewal of the lease.
2. *Landlord and Tenant—Estoppel.*—A landlord may by his acts be estopped from setting up a breach of the conditions of the lease and demanding a forfeiture.

*Appeal from St. Louis Circuit Court.*

The court gave the following instructions to the jury:

1. The plaintiff cannot recover in this cause unless he has proved to the satisfaction of the jury, that the lease read in evidence made by John Finney to Henry C. Brown was by written assignment transferred to the plaintiff with the assent of defendant; that within the time specified in said lease, or if the time was extended within such time as extended by John Finney, the lessee, or some person claiming under him, erected, or cause to be erected, on the ground mentioned in said lease, three good and substantial three-story brick houses, covering the entire southern front of said ground, and that all of the materials of every kind used in the erec-

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tion of said houses were of good merchantable quality, and that the joists and timber used therein were of proper sizes for such houses, and that all the outside walls were thirteen inch walls; or, that while said three brick houses were being erected on said premises, it was ascertained that they were not being built in conformity with the requirements of said lease, and that by reason thereof, and to save the forfeiture incurred thereby, Rhodes and the defendant agreed that if certain changes and alterations were made as determined upon by G. F. Barnett and L. D. Baker, and that such changes and alterations were made in accordance with the plans and directions of said Baker and Barnett, and that after such changes and alterations were made the said John Finney agreed to accept and did accept said houses, so altered and added to, as a full compliance with the terms of said lease in regard to the said three-story buildings.

2. If the jury, under the instruction No. 1, find the plaintiff is entitled to recover, they will assess his damages at the actual damage which they believe, from all the evidence, he has sustained by reason of the refusal of the defendant to renew said lease.

3. If the jury are satisfied from the evidence in this cause that said lease was not transferred by written assignments to said Garnhart, or that said three houses were not erected as specified in the instruction No. 1, or that said John Finney did not agree to accept, and did not accept, said houses, as altered and added to, as stated in said instruction No. 1, they will find for the defendant.

To the giving of these instructions the defendant excepted.

The defendant asked the following instructions:

1. If the jury believe from the evidence that on the 1st day of June, 1851, there had not been built on the lot demised by John Finney to H. C. Brown, by the lease read in evidence, three good and substantial three-story brick houses, covering the entire southern front of said lot, said houses be-

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ing of proper depth for stores or dwelling-houses—all materials of ever kind used in their construction being of good merchantable quality, the joists and all other timbers being of proper size for such houses, and all outside walls being thirteen inches thick,—then the building covenant contained in said lease, to be performed by said Brown or his legal representatives, was broken, and in order to enable the plaintiff to recover in this action the said plaintiff must show that there was a new contract or agreement made between the legal representatives of said Brown and the said Finney stipulating for the renewal of said lease of the 1st of June, 1859, and there is no evidence of such a contract.

2. By the terms of the lease executed by defendant to H. C. Brown, and in evidence, the said Brown and his assigns covenanted to build on the lot demised within two years from the 1st of June, 1849, three good and substantial three-story brick houses, covering the entire southern front of said lot; said houses to be of proper depth for stores or dwelling-houses; all materials, of every kind, used in the erection of said houses, to be of good merchantable quality; the joists, and all other timbers, to be of proper size for such houses, and all outside walls to be thirteen inches thick. By another covenant in the lease the defendant agreed to renew the lease at the expiration of ten years, provided the lessee or his assigns should have performed all the covenants mentioned in the lease to be performed by said lessee or his assigns. The plaintiff brings this action in virtue of the last named covenant. The action can be maintained only in one of two cases: first, in case the said lessee or his assigns performed their covenants as stipulated in the lease; or, secondly, in case they did something which the defendant agreed to accept as an equivalent for such performance. After the 1st of June, 1851, no verbal agreement or promise between the defendant, on the one hand, and the holder of the leasehold, on the other, could have the effect of enabling the plaintiff to maintain this action, provided that on the 1st of June, 1851, the said covenant to build was broken; and it was

broken if on that day the houses called for by the lease had not been erected on the Morgan-street front of said lot.

3. If the jury believe from the evidence that H. C. Brown, or his assigns, had not before the 1st of June, 1851, erected upon the lot demised by defendant, according to the lease read in evidence, three good and substantial three-story brick houses, covering the entire southern front of said lot, said houses being of proper depth for stores or dwelling-houses—all the materials of every kind used in their construction being of good merchantable quality, the joists and all other timbers being of proper size for such houses, and all outside walls being thirteen inches thick,—the building covenant contained in said lease, to be performed by said Brown or his assigns, was broken, and a covenant for a renewal of said lease, to be performed by the said defendant at the end of ten years from the 1st of June, 1849, was discharged; and the plaintiff cannot recover in this action without showing a new agreement in writing, signed by the defendant, expressly stipulating to renew the said lease, notwithstanding the breach of said building covenant. It will not be sufficient for this purpose that the jury should believe that some time after the 1st of June, 1851, the defendant agreed, either verbally or in writing, to extend for a specified time the period within which any of the covenants of the lease to be performed by the said H. C. Brown, or his assigns, might be completed. Nothing short of a contract in writing, signed by defendant, to renew the lease at the expiration of the ten years, will enable the plaintiff to maintain the action.

4. If, in putting up the building on the Morgan-street front of the lot described in the lease in 1855, Rhodes, the owner of the leasehold, used materials and workmanship inferior to what are called for by the lease, as explained in a former instruction; and if some of the defects caused in the building thereby were visible and apparent to the defendant and objected to by him at the time, but others were for the time hidden from his observation, and for that reason not commented upon by him; and if by reason of inferior workman-



ship, care and materials so used by the said Rhodes, but not then known to the defendant, the buildings erected by him on said Morgan-street front of said lot fell short of the description of the buildings called for by said lease, then the said building covenant was broken, and the plaintiff cannot recover.

5. If the jury believe from the evidence that after the 1st day of June, 1851, the covenant contained in the lease read in evidence respecting the building of the houses on the Morgan-street front of said lot having been unperformed and broken, there was a conversation during the summer of 1851 between L. F. Hastings, then the owner of said leasehold, and the defendant, in which the defendant, as a matter of indulgence and favor to said Hastings, promised that if the said buildings were erected within three years of additional time, then that defendant would take no advantage of their not having been erected within the first two years of said term; and if the jury believe that this was the only extension of time granted by defendant for the erection of said buildings, and that the same were not completed until the month of October, 1855, then the plaintiff is not entitled to recover in this action.

6. If the jury believe from the evidence that in the year 1855, while Rhodes was engaged in building the houses on the Morgan-street front of the lot demised to H. C. Brown by the lease read in evidence, the defendant objected to him that the same were not being built according to the lease, and threatened him with forfeiture of the said lease; and if the jury believe from the evidence that the said Rhodes was erecting houses on said front of a kind inferior in materials and workmanship to those called for in the lease; and if the jury believe that the said Rhodes and defendant did thereupon call on L. D. Baker and George Barnett to determine upon the changes, alterations and improvements of the said buildings to be made by the said Rhodes with the view of escaping the law of forfeiture; and if they further find that said Baker and Barnett did agree upon certain changes, al-

terations and improvements of said buildings to be made by said Rhodes under the supervision and to the satisfaction of said Baker, as the condition on which said forfeiture was to be waived,—then, unless the plaintiff has shown affirmatively that said changes, alterations and improvements were made by said Rhodes, and that the said Baker approved the same after they were completed, the plaintiff cannot recover in this action.

7. If the jury find from the evidence that the three three-story brick buildings required by the terms of the lease to be erected on the Morgan-street front of the premises in question were not erected prior to June 1, 1851, nor prior to the time that Leverett F. Hastings became assignee of said lease; and if the jury further find from the evidence that said Hastings, while he owned the said leasehold premises, made application to the defendant for an extension of the time within which to erect said three three-story brick buildings, and that the defendant verbally granted to said Hastings a further time of two or three years from June 1, 1851, within which to erect said buildings; and if the jury further find that said buildings were not erected and completed within said extended time, then the plaintiff cannot recover in this action, and the jury should find for defendant.

8. The plaintiff cannot recover in this action unless the jury are satisfied from the evidence that within two years from June 1, 1849, or within the extended time—if the jury find the time was extended—Henry C. Brown, or some party claiming under him, erected or caused to be erected on the Morgan-street front of the premises in question three good and substantial three-story brick houses, covering the whole of said front, and that all the materials of every kind used in the erection of said houses were of good merchantable quality, and that the joists and timbers used therein were of proper sizes, and that all the outside walls thereof were thirteen inch walls; or that, while the said three three-story brick houses were in course of erection, it was ascertained that they were not being built in conformity with the require-

ments of the lease, and that Jacob Rhodes, within the time specified in the lease, or within the extended time if the time was extended, made certain alterations spoken of by the witnesses in said buildings, and that after said alterations were made the defendant agreed to accept and did accept the said three houses so altered or added to, as a compliance with the terms of the lease in regard to such buildings.

9. The jury cannot infer either from the silence or the acts of the defendant that he consented or admitted that the buildings erected on the Morgan-street front of the premises in question were erected of materials and in a manner satisfactory to him. The express assent or admission of the defendant must appear from the evidence in the case.

10. If the jury find for the plaintiff, they can only assess in his favor the actual damage sustained by him by reason of the refusal of the defendant to execute a lease to the plaintiff of the premises described in his petition for a term of ten years from June 1, 1859.

11. In assessing damages in this case, the jury cannot allow in their assessment in favor of the plaintiff the amount or sums of money spoken of by the witnesses which the plaintiff expended for repairs upon the leasehold premises in question.

12. If the jury find from the evidence that the plaintiff, by his tenants, from and after June 1, 1859, occupied the premises in question until the tenants were put out by the defendant, the jury, in assessing damages in favor of the plaintiff, may deduct from the value of the leasehold premises on the 1st of June, 1859, whatever sum the jury shall believe from the evidence the said occupation of the premises was worth to the plaintiff.

13. If the said H. C. Brown and his assigns, up to the end of the month of October, 1855, had failed to keep and perform the building covenant contained in the lease, then the covenant for the renewal of said lease was discharged, and plaintiff cannot maintain this action without showing a new agreement for the renewal of the said lease, and such agree-

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ment cannot be shown except by writing signed by the defendant; and there is no evidence of such an agreement.

14. If the buildings erected on the lot demised by Jacob Rhodes were, when completed by him in October, 1855, inferior in material and workmanship to those called for by the building covenant in said lease, then the plaintiff cannot recover in this action.

Which instructions the court refused to give, and the defendant excepted.

*Krum, Decker & Krum, and T. T. Gantt*, for appellant.

The court below erred in admitting parol evidence, as well as proof of facts *in pais*, to show the assent of the defendant to the assignment of the lease in question, and also to show that he had either agreed to change its terms, or extend the time for the performance by the lessee of his covenant to build, or that defendant had waived its performance.

All of this evidence was objected to by the defendant in due form, at the trial, on the following grounds: (a) Because by the terms of the lease it cannot be assigned without the written consent of the lessor. (b) Because the time for the performance of the covenant to build, &c., cannot be changed or waived by a parol agreement, or by acts *in pais*, on the part of the lessor. (c) Because all evidence of this character is in conflict with the provisions of the statute of Frauds and Perjuries—1 R. C. 807; 2 Platt on Cov. 264-7; Tay. Land. & Ten. § 411; 15 J. R. 200.

*Glover & Shepley, and Cline & Jamison*, for respondent.

The same facts which are contained in the present record were before this court in *Finney v. City*, 34 Mo. 303. It was then held that "the plaintiff was entitled to the renewal of the lease, yet the remedy was in another form of action." The vital question here is whether Garnhart, the assignee of Brown, was entitled to a renewal of the lease under the evidence. It was admitted that the building covenant was not performed according to the strict terms of the lease; but

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the respondent Garnhart insists that during the erection of the buildings a modification of the building clause was assented to by Finney so as to bind him to treat the same as performed. It is admitted that a mere oral agreement is not competent to alter or modify a written contract, but it is contended that an oral agreement acted on by both parties, and the action under it accepted instead of the original stipulation, is obligatory, and does effectually alter the original written stipulation.

An oral agreement to alter a written contract, fully carried out, amounts to a discharge or satisfaction—*Townsend v. Empire Stone-dressing Co.*, 6 Duer, 214; *Delaiseix v. Buckley*, 13 Wend. 75; *Latimore v. Horser*, 14 J. R. 330; 1 Greenl. Ev. §§ 303-4.

The rule of law which prevents such injustice is, that when one relies on the verbal representations of another, and, so relying, acts to his injury, the other shall be held to his declarations, statements, or promises—*Dyer v. Cady*, 20 Conn. 563; *Brown v. Wheeler*, 17 Conn. 353; *Roe v. Jerome*, 18 Conn. 138; *Cowles' Ex'r v. Baun*, 21 Conn. 467.

The defendant is estopped to deny that Rhodes' lease was valid. Whoever prevents the performance of a condition, cannot take advantage of it—*Majors v. Hickmot*, 2 Bibb, 218; *Carrell v. Collins*, id. 431; *Merford v. Ambrose et al.*, 39 Me. 688; *Clendenin v. Purcell*, 3 Mo. 230.

If Finney did not literally prevent Rhodes from performing his contract, he did assent to other things in lieu of performance, and did waive the right of forfeiture incident thereto. This right of forfeiture once waived, was lost forever. It could not be set up again at the end of the first ten years. The party having the right to insist on a forfeiture, must do so or abandon it—*Tay. Land. & Ten.* § 497.

In *Goodright v. Davis*, Cowp. 803, the condition was such that underletting, without the consent of lessor under his hand and seal, worked a forfeiture; but it was held that after breach a receipt of rent would waive the forfeiture. Any act of the landlord showing that he means the lease to con-

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tinue is a waiver—Doe ex d. v. Mieux, 4 Barn. & Cress. 606; Doe ex d. v. Birch, 1 Mees. & W. 408; Coon v. Brick, 2 N. H. 163; Chrysmon et al. v. Gurine, 5 Cal. 51; Jackson v. Allen, 3 Cow. 220; Jackson v. Brownson, 9 J. R. 227.

But a covenant of renewal is a mere incident to the lease. If the lease is valid, the covenant to renew is valid—Blackmore v. Boardman, 28 Mo. 425. There is nothing in the supposition that Finney, having waived the forfeiture for non-performance of the building clause, was bound to respect the lease for ten years, but not bound to renew. A waiver is a waiver for all purposes.

HOLMES, Judge, delivered the opinion of the court.

This is an action for damages on a breach of covenant for the renewal of a lease, at the suit of the last one of several successive assignees against the lessor. The lease provided that every failure to pay the quarterly rent reserved, or to pay the taxes, or to keep any perform any of the other covenants, agreements, or stipulations, therein set forth, should "make and create a forfeiture of the lease," if so determined by the lessor, by a notice in writing. The lease was not to be assigned by the lessee, under penalty of forfeiture, without the written consent of the lessor. The lessee bound himself, his heirs, executors, administrators, *and assigns*, to erect three good and substantial three-story brick houses, of a specific quality and description, on the lot demised, within the first two years of the term, which were to be the property of the lessor at the end of the lease and renewals. The lease was for a term of ten years, and was to be renewed for another term of ten years, "provided the said lessee, or his legal representatives or assigns, shall punctually pay all the rents and taxes" which might be assessed and legally demanded, "and perform all the other covenants, agreements and stipulations herein set forth." The renewed lease was to contain similar covenants, except that the rent was to be fixed upon a valuation by appraisement in the lease specially provided; and a second renewal for still another term of



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ten years was to be made in the same manner, and subject to like covenants, agreements, and stipulations.

There was evidence to the effect that some of the successive assignments of the lease had been made without license in writing, and some upon a written consent, which had been lost; but that the lessor had never enforced a forfeiture of the lease for this or any other reason, and had accepted rent, with full knowledge of this failure, from the several assignees in succession, down to the end of the term; that the three houses had not been built within the first two years of the term; that the time had been afterwards extended by the lessor by a writing, which had been lost, or was not produced; and that the assignee in possession, with this knowledge and consent of the lessor, and in pursuance of an arrangement made with him, had proceeded to erect these three houses under the lease, which were still not complete within the extended time, nor to the entire satisfaction of the lessor—but that, upon certain alterations and improvements being made under the supervision of certain arbitrators, the lessor had finally consented not to insist upon forfeiting the lease, and accepted the buildings as they were, as a performance of the covenant, and expressed himself satisfied: he continued afterwards to accept rent as before until the end of the term, and never took any steps to forfeit the lease.

At the end of the term, the lessor refused to renew the lease according to the covenant for renewal, proceeded to eject the tenants, and took possession of the property. He now takes the ground that the covenants and agreements, on which the stipulation for a renewal depended, had not been kept and performed according to the terms and conditions of the lease, and that he was not bound to renew. It is answered, on the other side, that all right of forfeiture for the reason that the lease had been assigned without the written consent of the lessor, or that the other covenants had not been kept, had been waived by the subsequent acceptance of rent, with notice of the cause of forfeiture, and that any right

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to refuse a renewal of the lease, on account of any breach of the building covenant, had been waived; also by his own acts, and by his acceptance of performance of the substituted agreement, that he was estopped to deny that this covenant had not been performed.

The covenant of the lessee, for himself *and assigns*, to build houses on the land demised, binds the assignees by express words, and the covenant runs with the land—*Dumpor's case*, 1 Smith's Lead. Cas. 102.

The acceptance of rent, after full notice or knowledge of the failure for which a forfeiture might have been claimed, was a waiver of the forfeiture, which could not afterwards be asserted—1 Smith's Lead. Cas. 83; *Goodright v. Davis*, Cowp. 803; *Roe v. Harrison*, 2 T. R. 225; *Ormsby v. Woodward*, 6 Barn. & Cr. 519.

It was in evidence that the landlord elected to retain the reversion with its incidents, and continue the lease, without reentering to take the land itself. Slight acts are deemed sufficient for this purpose, and any recognition of a tenancy subsisting after the right of entry has accrued, and the lessor has notice of the forfeiture, will have the effect of a waiver—2 Platt on Leases, 468; Tay. Land. & Ten. §§ 497-8; *Coon v. Brickett*, 1 N. H. 163; *Jackson v. Brownson*, 7 J. R. 227; *Jackson v. Allen*, 3 Cow. 220. A man may be estopped by acceptance of rent—4 Com. Dig. (tit. Cov. A. 3) p. 79.

The principle is not confined to a forfeiture for assigning without license, or for non-payment of rent, but extends to any other ground of forfeiture which merely makes the lease voidable, unless the lessee proceeds to enforce the forfeiture by re-entry. Forfeitures are not favored in the law, and where a forfeiture is once waived, the court will not assist it—Cowp. 803. The clause in this lease which gave a right of forfeiture and re-entry for non-payment of rent and taxes, or for any failure to keep and perform the covenants, agreements and stipulations in lease, did not make the lease absolutely void, but only voidable at the election of the lessor. It may be considered as well established that where an estate

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in land has been forfeited by non-performance of conditions at the day, the forfeiture will be waived by accepting performance at a subsequent period; and where a covenant has been broken already, the acceptance of performance of a new agreement substituted in place of it will have the same effect—1 Smith's Lead. Cas. 88; Chalker v. Chalker, 1 Conn. 79; Clark v. Jones, 1 Denio, 516; Jones v. Carter, 15 Mees. & W. 718.

This covenant for a renewal depended only upon the condition that the lessee or his assigns should pay the rent and taxes, and perform the other covenants; and the lease was conditioned to be forfeited at the option of the lessor, on notice in writing, upon any failure to keep and perform these same covenants. No forfeiture was enforced during the term. The rents were accepted to the end of the term with knowledge of all causes of forfeiture. The failure to perform the building covenant was certainly well known to him, and the evidence tended strongly to prove that he had granted an extension of the time; that he was fully aware of the progress and completion of the work; that he complained, negotiated, and arbitrated, concerning it; that, upon urgent solicitation, he had forbore to take any steps to forfeit the lease; and that when the work was finished, though not done exactly according to the new agreement or the provisions of the building covenant, he not only accepted it as a performance and expressed himself satisfied, but certainly forbore ever afterwards to claim any forfeiture on account of a failure to keep and perform that covenant or any other. He stood by and saw the work go on, and encouraged the assignee to expend his money in the completion of valuable buildings, which were to become his property at the termination of the lease and renewals. He knew that the work was done under a full persuasion that it would be accepted as a performance, or in place of a performance, of this covenant. The work was done within about four years of the end of the term; and now, after such acceptance, he insists upon a breach of this covenant as a justification for his refu-

sal to renew the lease, and claims that it had been irrevocably broken before the work began.

It is not to be supposed that the assignee had any expectation that his lease was to end in four years after the erection of these houses, nor that the lessor was not fully aware that he relied upon a renewal of the lease according to its tenor, and depended upon his acceptance as a waiver of all cause of forfeiture and a performance of the covenant. It may as well be said of this waiver as of a waiver of an assignment without license, that to hold otherwise would be "productive of great injustice, and enable a landlord to eject a tenant after he had given him reason to suppose that the forfeiture was waived, and after the latter had, on this supposition, expended his money in improving the premises"—Ormsby v. Woodward, 6 Barn. & Cr. 519; 2 Platt on Leases, 469.

If a man be estopped by the acceptance of rent, and if such acceptance, with knowledge of the previous causes of forfeiture, implies a still subsisting lease, and precludes a forfeiture afterwards for the same causes, why may not the acceptance of performance of this building covenant, or rather of the agreement substituted in the place of it, together with the continued acceptance of rent, be deemed an irrevocable waiver of this cause of forfeiture?

If the lessor intended to refuse a renewal, why did he not so inform the tenant before he began to build? or why did he allow him to proceed with the expenditure of his money? Not to hold that this was not a complete waiver, would be a great hardship upon the plaintiff: and viewing the matters with reference to the whole conduct of the defendant, it would certainly have all the effect, if it did not wear the aspect, of an intentional fraud. When a man by his words or conduct knowingly causes another to believe in the existence of a certain state of things, and induces him to act upon that belief so as injuriously to alter his previous position, the former will be concluded from averring, as against the latter, a different state of things as existing at that time; or asserts a fact upon the faith of which another acts, and will receive

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damage if the fact be not true, he shall be estopped from contradicting it.—*Brown v. Wheeler*, 17 Conn. 353. We think the case comes within the doctrine both of waiver and estoppel—1 Greenl. Ev. § 207; *Dezell v. Odell*, 3 Hill, 215; *Townsend v. Empire Stone-dressing Co.*, 6 Duer, 208.

The defendant cannot now be heard to say that the covenants of this lease had not been fully performed. It matters not that the building covenant had been broken and the term elapsed. The substitution of a new arrangement, even by parol, which was acted upon by both parties and executed to the satisfaction of the defendant, was enough. It is insisted that the proof of this satisfaction was not clear. We do not lay the whole stress upon this admission that he was satisfied. The facts themselves, the acts of the parties, the forbearance to claim a forfeiture, the acceptance of rent, the confiscation of the buildings, speak louder than his express admissions, and are even more satisfactory.

The first instruction given for the plaintiff placed the issue of a waiver by acceptance substantially before the jury on all the evidence bearing upon the question; and this issue was decisive of the case.

The instructions refused for the defendant proceeded upon a theory of the law which cannot be sustained.

As to damages, the general rule was correctly laid down by the court. It is insisted that the plaintiff was not entitled to recover for the expense of repairs made upon the premises shortly before the end of the first term. This may be so in some cases; but here it was proper for the jury to consider as well the value of the improvements made during this first term as the future value of the leasehold in estimating the actual damage sustained by the plaintiff in the breach of the covenant to renew. The evidence tended to prove that the value of the future leasehold with the renewals was about twenty thousand dollars. The expense of repairs would seem to have been deducted in the verdict, which was for some sixteen thousand dollars only. We see no reason to think the verdict was excessive.

Judgment affirmed. The other judges concur.

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State to use, &c. v. Dean et al.

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THE STATE OF MISSOURI TO THE USE OF FRANKLIN H. GODDARD, Respondent, v. HENRY DEAN and ELIZABETH MATTHEWS, Adm'x of THOMAS MATTHEWS, dec'd, Appellants.

*Bonds—Blanks—Alterations.*—The alterations which will avoid a bond must be material ; the mere correction of the mistake in the filling up of a name in the body of the bond is not a material alteration. A blank in a bond given to a sheriff upon a claim for property levied upon under execution may be filled up with a description of the property seized, the blank being intended for that purpose, and the authority of the parties will be presumed. Whether the alterations in a bond are material is a question of law for the court ; but whether the alterations were in fact made, or whether blanks were filled, by authority, are questions of fact for a jury.

*Appeal from St. Louis Circuit Court.*

At plaintiff's request the court gave the following instructions, to the giving of which defendants excepted :

1. If the bond read in evidence was executed in blank, to be filled up afterwards by the addition of a list of the goods taken, or of any other part thereof, the addition of such matter after the signing will not affect the validity of the bond, or discharge the obligors.

2. If said bond was executed and delivered to the sheriff, or his deputy, to indemnify Franklin H. Goddard, as claimant, of the goods seized, and by mistake his name was first written Francis Goddard, and afterwards changed to his correct name, Franklin Goddard, such change will not vitiate said bond, or discharge said obligors, though it were made after the signing and delivery of said bond.

The court then gave the following instruction for defendants :

1. If the court, sitting as a jury, believe from the evidence that the bond sued on was executed and delivered to the sheriff in blank as to the goods claimed, and that afterwards the inventory of goods was attached without the consent or knowledge of defendants, then the finding should be for defendants.



Defendants then asked the court to give the following instructions, which the court refused to give, and defendants excepted :

2. If the court, sitting as a jury, believe from the evidence that the bond sued on was executed and delivered to the sheriff to protect the sheriff against the claim of Francis H. Goddard, and that afterwards the sheriff, without the knowledge or consent of defendant, changed the name of Francis to Franklin, then the finding should be in favor of defendants.

3. If the court, sitting as a jury, believe from the evidence that, after the execution and delivery of the bond sued on, the sheriff demanded a new bond in place of the one sued on, and such new bond was executed and delivered to him in lieu of the one sued on, the plaintiff cannot recover on the bond sued.

4. If the court, sitting as a jury, shall believe from the evidence that the bond sued on was executed and delivered to the sheriff before a claim was made by the claimant in writing verified by affidavit, the finding should be for the defendants.

5. If the court, sitting as a jury, shall believe from the allegation of the plaintiff in the pleadings, or the evidence, that Goddard, to whose use this suit is brought, sued and recovered against the sheriff of St. Louis county and others for the seizure and sale of the same goods sought to be recovered for in this suit, then the finding should be for the defendants.

6. The court, sitting as a jury, will exclude from consideration, under the pleadings in this case, all evidence in regard to the value of the goods sought to be recovered for.

7. If the court, sitting as a jury, believe from the evidence that the bond sued on, after execution and delivery to the sheriff for his protection, was by him or his deputy altered or changed by changing the name of the claimant from "Francis" to "Franklin," then said bond is not legal against defendants, and should be excluded.

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*M. L. Gray*, for appellants.

Defendants' fifth instruction should have been given. If the bond was insufficient to protect the sheriff, and Goddard elected to repudiate the bond and to sue, and did sue and recover of the sheriff, that election of remedies bars him from suing on this bond. The remedies are not cumulative, but alternative and inconsistent. He could not hold the sheriff except by averring and proving the invalidity of the bond; and having averred and proved the invalidity of the bond, he could not then take the inconsistent position of asserting the validity of the bond.

By suing Clark, Cochran and Castello, sheriff Goddard repudiated the bond. This bars him of the right to afterwards sue on the bond. If he repudiates the bond in part, he repudiates it altogether—4 Mich. 508, 511; 5 Metc. 49; 1 Denio, 69; 2 Smith's Lea. Cas. 81, 87; *Morris v. Roxford*, 18 N. Y. 553; 33 Penn. 256; 36 N. H. 449; 14 Me. 364; 4 T. R. 211.

*G. P. Strong*, for appellant.

The alterations in the bond, if any were made, were both immaterial, and were made, if made at all, after the signing of the bond in furtherance of the intention of the parties who signed the bond as obligors and with their implied assent. Such alterations do not invalidate the bond—2 Pars. on Cont. (5 ed.) 719, *n. e et seq.*; *Texira v. Evans*, cited by J. Wilson in 1 Anst. 228; *Stahl v. Berger*, 10 Serg. & R. 170-2; *Wiley v. Moore*, 19 id. 438-40; *Ogle v. Graham*, 2 Penn. 132-4; *Wooley v. Constant*, 4 J. R. 54, 59, 60; *Ex parte Kirwin*, 8 Cow. 118; *Henfro v. Bromlee*, 6 East, 309; *Boyd v. Brotherton*, 10 Wend. 93; *Nichols v. Johnson*, 10 Conn. 192, 197; *Smith v. Crocker*, 5 Mass. 538; 1 Smith's Lea. Cas. 817, notes.

HOLMES, Judge, delivered the opinion of the court.

The suit is upon a bond taken by the sheriff upon a claim made under the statute for certain goods levied on under ex-

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ecutions in his hands. The plaintiff recovered judgment, and the defendants bring the case up by appeal.

The grounds of error that are chiefly relied on arise upon the instructions and concern the execution of the bond. It is objected that after the bond was signed by the defendants, the deputy sheriff changed the name of the claimant mentioned therein by altering the christian name from *Francis* to *Franklin*, and filled up the blanks left for the description of the property levied on by annexing thereto the inventory of the goods (which was very long), when the same had been completed some days afterwards. The bond was duly approved by the sheriff and returned into court.

The evidence showed that the mistake in the name was merely a clerical error; that the real name of the party intended was Franklin; and that the inventory annexed was of the goods which had been levied on, and were claimed, and were the same that were intended and understood by the parties. There was nothing to show that the bond was filled up otherwise than in accordance with the real transaction and the intention of all the parties. There was no proof that any fraud was attempted or accomplished, nor that any injury was done to the defendants. The several acts done—the levy, the claim, the execution of the bond and its approval and return—are to be taken as parts of one and the same transaction. On the facts shown, the officer must be deemed to have had authority from the defendants signing the bond to fill up these blanks in conformity with the true nature of the transaction and in pursuance of the real intention of the parties. There was no such material alteration here as will avoid the instrument. Whether the alteration were material or not is a question of law for the court; but the question whether any material alteration was in fact made, or whether there was authority to fill up the blanks and alter the name in the manner in which these things were done, is a matter for the jury to determine—2 Pars. on Cont. 719–22; *Stahl v. Berger*, 10 Serg. & R. 170;

Smith v. Crocker, 5 Mass. 538; Wooley v. Constant, 4 J. R. 54; Ex parte Kirwin, 8 Cow. 118.

The jury have found the facts for the plaintiff under instructions which laid down the law correctly enough, and their verdict must not be disturbed. The question of intention and authority was submitted to the jury; the actual knowledge or consent of the parties afterwards was immaterial. Nor was it a matter of any consequence that the bond bore date of one day and the claim in writing of the next day, when it appeared that it was all one transaction. There was no error in refusing the defendants' instructions on these points.

We think it very clear that the plaintiff was entitled, on the evidence, to recover the damages covered by the bond. His former recovery against the sheriff and his sureties, in a suit resting upon the ground that the bond taken was not large enough to cover the value of goods levied on and therefore did not protect the sheriff, but which had never been actually paid, was no bar to a suit upon this bond, nor to a recovery for the amount covered by it. In this respect the remedies were merely cumulative. Actions against a number of persons who are severally liable for the same thing, or against the same persons on distinct securities for the same debt or duty, are consistent and concurrent remedies—State to use *McMurray v. Doan*, 39 Mo. 44.

Judgment affirmed. The other judges concur.



MARY REILY, Defendant in Error, v. BARTON BATES, Plaintiff in Error.

*Dower—Admeasurement—Annual Value.*—In assessing the annual value of the dower of the widow in land not susceptible of being admeasured, the value is to be determined from what may be the net annual product without the expenditure of money or labor after deducting all charges to which the land is subject, such as taxes, repairs, &c. See *Clamorgan v. Rippey*, 15 Mo. 331.

*Error to St. Louis Land Court.*

This suit was commenced at the March term, 1854, of the St. Louis Land Court, by Mary Reily, to recover her dower in one undivided two thirds part of lot No. 28 in John P. Reily's addition, &c. The defendant answered, admitting the demandant's right; but in his answer, to avoid the payment of allowance in lieu of an assignment in kind, offered to have set off to her a quantity of land greater than she was entitled to. Upon this answer, judgment was given for the demandant that her dower be assigned her, and commissioners were appointed to set off the same. The commissioners having proceeded, &c., reported that the premises were not susceptible of division.

At the October term, 1856, a jury was empannelled to assess the demandant's damages and the yearly value of her dower. A trial was had and the damages were assessed at one hundred and five dollars and sixty cents, and the yearly value of the dower at thirty-nine dollars and sixty cents, for which the demandant had judgment.

The case was submitted to the jury upon the following instructions for plaintiff:

1. The jury is instructed that the yearly value of the plaintiff's dower in the premises is such sum as the property might produce when used so as to make it reasonably productive, considering the value, locality, fitness for various uses, and all circumstances by which its productiveness may be increased or diminished, exclusive of taxes and such other charges as the property may be subjected to.
2. The jury is instructed that the fact that the defendant chooses to let the property be idle and unproductive, furnishes no reason for diminishing the yearly value to be assessed.
3. The yearly value is to be assessed without regard to the uncertainty of the widow's life and without regard to her age. The question is, what would be the yearly value of the premises to the defendant when used by him so as to make the same reasonably productive without regard to time?

4. The jury is instructed that the plaintiff is entitled to damages from the commencement of this suit down to the present time, the measure of which damages is the yearly value of one third of two thirds of the whole lot.

5. The jury is instructed that the yearly value to be assessed is one third of an undivided two thirds of the whole lot of fifty feet on Fifteenth street by a depth of one hundred and fifty feet to an alley.

Defendant prayed the following instructions, which were refused :

1. In estimating the yearly value of the widow's dowry, the jury will find it as the net annual product of one third of two thirds of the whole lot without the expenditure of money or labor upon it after deductions made from its gross income of all the charges to which it is subject, such as taxes, &c.

2. The owners of the land are not bound to improve it for the benefit of the doweress. It is at his own option to improve it or not, as may seem best to him for his own interest.

3. The plaintiff in this case has been adjudged to be entitled in right of dower to the possession and use of one third part of two thirds of the lot of ground in question during her life ; but as by the report of the commissioners she cannot have that, she is now entitled to an annual sum of money in lieu of the land equal to the annual value of the land itself ; and in estimating the annual value of the dower, the jury ought not take into account improvements which the owners may or may not make hereafter.

*Gibson, Colman and Bland*, for plaintiff in error.

*S. A. Holmes*, for defendant in error.

FAGG, Judge, delivered the opinion of the court.

This suit was instituted in the St. Louis Land Court. The defendant in error (plaintiff below), as the widow of John P. Reily, deceased, claimed to be entitled to dower in the undivided two thirds of a vacant lot of ground situate in



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the city of St. Louis. The defendant Bates admitted in his answer the right of the plaintiff, coupled with an offer to have the same admeasured and set apart to her in a quantity even larger than in strictness of right she might be entitled to. This offer was afterwards and before the trial extended to a surrender of the entire ground to the plaintiff for and during the term of her natural life. This offer however was not accepted and the suit was prosecuted to a judgment in favor of the plaintiff, and the case is brought to this court by writ of error.

The entire trial in the Land Court proceeded upon the theory that as it had been ascertained by the report of the commissioners that the property was not susceptible of division so as to set off the widow's dower in kind, that an amount of money equal to one third of the yearly value of two thirds of the premises must be paid to her, to be fixed by ascertaining what the yearly rent would be if the same had been so improved and used by the defendant as to make it reasonably productive.

The pleadings show the fact that the defendant Bates was a mere trustee. But if he had been absolutely the owner of the fee, it is difficult to perceive upon what grounds such a theory could be based. It seems to be well settled in this country that the endowment of the widow "is to be according to the value at the time of alienation in case the husband sold in his life-time, and according to the value at the time of assignment if the land descended to the heir."—4 Kent's Com. (6th ed.) 65. If improvements are made by the heir previous to the assignment, she will get the benefit of them. If, however, the property is suffered to remain in the condition in which it is found to be at the time that the right of dower becomes consummated, she cannot go beyond its ascertained value at that time. In the case of *Reily v. Clamorgan & Rippey*, 15 Mo. 331, this question was clearly settled. Judge Gamble, in delivering the opinion of the court in that case, said: "The yearly value of real estate is its net annual product without the expenditure of money or labor upon it after

the deductions have been made from its gross income of all the charges to which it is subject, such as taxes, repairs," &c.

This is a question that depends upon all the facts and circumstances attached to the particular property in which dower is claimed. If it be said that it is the duty of the owner of the fee to improve an unproductive piece of property in which dower is claimed so that the same shall be made productive, by what rule is the measure of such improvements to be fixed? We know of no rule of law that imposes such an obligation on the person claiming the fee. In the very nature of things no rule can be laid down by which the character and amount of the improvements could be fixed. It is true that the owner would have no right to do any act which would be calculated in the least to lessen the productiveness of the property. But the question does not depend upon whether the property is actually used or not. The question is, what is the yearly value to be placed upon the property if used, or permitted to be used, for the purposes to which it is particularly adapted? This we understand to be the spirit of the rule laid down by Judge Gamble in the case cited.

It follows, then, that the admission of the testimony on the part of the plaintiff, to show that the property described in the petition if improved by the erection of houses thereon in a reasonable and proper manner so as to make the property productive, was erroneous. The defendant ought to have been permitted to introduce testimony to prove that the annual product of the premises, without the expenditure of labor or money, after deducting the taxes, would have been nothing. The instructions given on the part of the plaintiff, and predicated upon the testimony thus erroneously admitted, were also improper. The instructions asked by the defendant and refused by the court ought to have been given.

The judgment of the Land Court must therefore be reversed, and the cause remanded for further trial, in accordance with this opinion. The other judges concur.

JOHN L. BERNECKER, Respondent, v. WENDELIN MILLER and  
MARTIN MILLER, Appellants.

*Forcible Entry and Detainer—Possession—Tenants in Common—Ejectment.—*

The possession of one tenant in common is the possession of all. Where two are in possession together, and one only is turned out, and the other still remains, his possession is for his co-tenant as well as himself—Garrison v. Savignac, 25 Mo. 47.

*Appeal from St. Louis Circuit Court.*

The court gave the following instruction for the plaintiff, which was excepted to :

“If the jury believe from the evidence that the plaintiff by his servant was in possession of the premises, and the defendants, by threats, words or actions calculated to excite fear and apprehension of danger, entered upon the premises in question, or any part thereof, and turned the complainant or his servant out, then the defendants are guilty of forcible entry and detainer.”

The defendants asked the following instruction, which was refused and excepted to :

“On the evidence, the plaintiff cannot recover against Martin Miller.”

The following instruction was given for defendants :

“Unless the plaintiff shows by proof an actual possession in himself, or by his servant or agent, prior to the filing of this writ, he cannot recover.”

On its own motion, the court gave the following :

“Unless the defendant Martin Miller, at the time the sheriff executed the writ of possession, was in possession of part of the premises (if he was in such part possession) as the servant or agent of the defendant Wendelin, the jury cannot find a verdict against Martin.”

The verdict of the jury was against the defendants.

*P. C. Morehead*, for appellants.

*R. S. McDonald*, for respondent.

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HOLMES, Judge, delivered the opinion of the court.

This was an action of forcible entry and detainer. It appears that the defendants had been in possession of the premises together as heirs and tenants in common; that Wendelin Miller (who held by right of his wife) had taken a lease from the plaintiff, who was not in any actual possession of the premises at the time, which included these premises (as Wendelin says, by mistake in the description, of which he knew nothing, not being able to read English); and at the expiration of this lease the plaintiff sued him and obtained a writ of possession against him, which was executed by the sheriff by putting out Wendelin and his family, leaving Martin Miller in possession as before. There was nothing to show that either one of these tenants in common had the exclusive possession more than the other. After being put out, Wendelin and his family returned into the house, where Martin still remained.

This action is brought against both Wendelin and Martin, and is founded upon the idea that the plaintiff, by turning out Wendelin, had obtained the exclusive possession of the premises. But the sheriff did not turn out Martin because his writ did not name him, and there was no re-entry by him upon any possession of the plaintiff. The plaintiff, being a witness, said that Martin was a hired man and a servant of Wendelin. Wendelin Miller testified that Martin occupied the premises before he went there, and continued to occupy a room in the house, not as his servant.

The court left it to the jury to say whether or not Martin was in possession only as the servant of Wendelin, and the jury found for the plaintiff.

The defendant asked the court to instruct the jury, that, on the evidence, the plaintiff was not entitled to recover against Martin. This instruction was refused. We think the instruction should have been given. Martin was in possession as one of the tenants in common; he had not been dispossessed by the sheriff; he had not made any forcible entry upon any possession of the plaintiff. That he may

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have been a hired man to do work for Wendelin, or may have been his servant otherwise, was not conclusive of his right to the possession of the premises. The possession of one tenant in common is the possession of all. Where two are in possession together, and one only is turned out, and the other still remains, his possession is still that of the other also as well as his own. We are inclined to think the case came within the decision in *Garrison v. Savignac*, 25 Mo. 47, and that there was error in refusing the defendant's instruction.

Judgment reversed, and the cause remanded. The other judges concur.

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ADOLPH FISHER, Defendant in Error, v. GERT GOEBEL, Plaintiff in Error.

*Damages—Covenant—Landlord and Tenant.*—In an action of covenant by the lessee against the lessor for failing to build a sufficient wall in accordance with his covenant, the lessee can recover such damages only as are direct and immediate, but not remote, speculative or contingent damages, or such as might have been avoided by his own act. The proper measure of damages would be the cost of repairing or building the wall, and compensation for the use of the premises of which he was deprived while they were undergoing repairs.

*Error to St. Louis Court of Common Pleas.*

Instruction given for plaintiff:

1. If the jury find from the evidence that the defendant neglected and failed to build a suitable and sufficient wall and fence along the south side of the domicile premises as provided in the lease read in evidence, and if the jury further find from the evidence that by reason of the failure of the defendant to build such wall and fence the plaintiff sustained damage and injury, then the plaintiff is entitled to recover in this action.

The court, on its own motion, gave instruction No. 6 to the jury:

6. If the jury find for the plaintiff, the measure of dama-

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ges is the difference between what would have been the value of the rent or use of the leased premises in case the defendant had fully kept and performed the covenants in the lease, and what was the value of the rent or use of the same premises in the condition they actually were by reason of the failure of defendant to keep or perform any of said covenants; but the jury cannot allow the plaintiff anything in respect to the value of the use of improvements put upon the premises beyond \$800 worth of such improvements.

Instructions given for defendant :

2. The plaintiff admits in his petition that he abandoned the premises the 15th July, 1859; the jury, therefore, in estimating any damages the plaintiff has sustained by the neglect or improper acts of the defendant, cannot consider any benefit or advantage the plaintiff may have derived from the lease if he had continued in possession until the end of the term.

3. The jury cannot, in estimating the plaintiff's damages, take into consideration the cost or value of the improvements made by him on the leased premises beyond \$800, nor ought they to consider the fact that the plaintiff abandoned and left the buildings and improvements he had made thereon.

4. If the wall put upon the south side of the leased premises by Goebel fell down not by any fault of the said Goebel, but by reason of negligent conduct of the plaintiff in not protecting it against the water which flowed from the buildings he had erected, then plaintiff cannot recover damages on account of the falling of said wall.

5. The defendant is entitled to recover on his counterclaim the rent secured by the lease remaining unpaid prior to the abandonment of the premises by the plaintiff.

Defendant's instructions refused :

7. The jury are instructed that if they find the defendant has violated any of the covenants contained in the lease, as stated in the petition, it is their duty, in ascertaining the damages, to be governed by the evidence, and they can only allow in their verdict such actual damages as resulted di-



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rectly to the plaintiff from the defendant's neglect in relation to the stone wall, or from his conduct in relation to the entrance and buildings erected on Seventh street; for the plaintiff is not entitled to damages for any loss of profits in his business, or for any loss of customers or visitors to his garden.

8. If the jury find from the evidence in the cause that the wall which plaintiff put up on the south side of the leased premises was not a good and sufficient wall, defendant was bound to make it so, and, if said defendant failed to make it so, then it became the duty of the plaintiff, for his own protection, to make said wall good and sufficient; and if the jury find from the evidence that plaintiff might easily have made said wall good and sufficient before any appreciable injury would have been sustained by want of a good and sufficient wall to the grounds or buildings of the leasehold premises, and would not do so, he cannot recover in this action any damages in respect to said wall beyond the cost and expense of making the same good and sufficient. Or if the jury shall find that, notwithstanding prompt and diligent action on the part of plaintiff to make said wall good and sufficient after it fell, some injury to the buildings or grounds of the leasehold premises would have been sustained before plaintiff could have made said wall good and sufficient, then plaintiff cannot recover in this action any damages beyond the amount of such injury to such grounds and buildings, and the cost and expense of making said wall good and sufficient.

9. The jury are instructed that if they find from the evidence in the cause that Fulton street has not been opened, the defendant was not bound to build any wall on the south side of the leased premises, and no damages can be recovered against him in respect to his not building such wall in a proper manner, or not repairing the same.

10. The plaintiff is liable to pay rent from the commencement of the lease until Goebel re-entered, and if the jury find Goebel did not re-enter until the month of September, 1859,

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defendant is liable to pay rent for the three months of June, July and August, 1859, and they should so find on the counter-claim, with interest on that amount.

*Glover & Shepley*, for plaintiff in error.

We contend that the rule of damages in the case is illustrated by the old saw, "a stitch in time saves nine"; that it is the cost of the repair, and not the damage resulting from the ultimate consequences of the want of repair, which fixes the limit of the legal injury. In other words, it is the immediate and not the remote consequential effect which the law considers in estimating the damages. The doctrine for which we contend is well stated thus: "In assessing damages, the direct and immediate consequences of the injurious act are to be regarded; not remote, speculative and contingent consequences which the party injured might easily have avoided by his own act.—*Locker v. Damon*, 17 Pick. 288; *Thompson v. Shattuck*, 2 Mete. 615; *Walker v. Swayzee*, 3 Abb. P. 136; 2 Ad. & El. (N. S.) 225; *Penly et al. v. Watts*, 7 Mees. & W. 601; *Colby v. Shelton*, 2 Barn. & Cres. 278; *Walker v. Hutton*, 10 Mees. & W. 247; *Short v. Callaway*, 11 Ad. & E. 28.

*Krum, Decker & Krum*, for defendant in error.

For every breach of an express contract, the damage to be incurred is the injury suffered; compensation for the breach is the rule.

The distinction between general covenants of warranty in the sale of land and an express covenant by a landlord to his tenant must be kept in mind. A lease is a chattel; the premises return to the landlord. The increase in value of a lease during its continuance is the subject of contracts; it enters into the contemplation of the parties.

Where the landlord is under an express contract to make repairs and he fails, the tenant may make them and hold the landlord for the expense, but he is not obliged to do it; his failure to do it can constitute no exercise for the breach of

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the landlord's express contract, nor can the probable cost of the repair be the proper measure of damage. But in this case the wall to be built was outside of the leased premises, and is not a repair on the premises, but an erection necessary to the support and enjoyment of the leasehold.—Ward v. Smith, 11 Price's Exc. 19. This case was approved in Driggs v. Dwight, 17 Wend. 71; in Trull v. Granger, 8 N. Y. 115; in Worcester v. Rowland, 9 Car. & P. 739, and Smith v. Peat, 9 Exc. R. 165.

*A fortiori*, where the landlord is under covenant to put up a wall, on the south side of the premises, which is necessary to its support, the tenant has a right to damages resulting to his term by not having this support.

Defendant's instructions Nos. 7 and 8, which sought to limit the measure of recovery to the cost of a wall, were correctly overruled; and the instruction given by the court of its own motion was sufficiently favorable to the landlord.

If the tenant had remained in possession, it would be no defence to an action for rent that the landlord broke his covenant to build the wall; but the tenant is not liable for any time after he quits if the landlord is in fault—Jackson v. Eddy, 12 Mo. 210.

HOLMES, Judge, delivered the opinion of the court.

The plaintiff had leased from the defendant the premises called the "Flora Garden," situated on the corner of Seventh street and Geyer avenue, in 1855. There was a cut some fifteen or twenty feet deep on Geyer avenue, and the lessor covenanted in the lease that he would build at his own expense a rock wall and fence on that side; and the lessee covenanted to keep the leased property in a state of repair. Some two years after this wall was erected, it fell down by parts by the action of the elements. The defendant was called upon to rebuild it, but before this was done the plaintiff abandoned the premises and surrendered his lease.

The plaintiff proceeds on the assumption that the covenant of the lessor had been broken by the falling down of this wall,

and that it belonged to the lessor and not to himself to rebuild it. The case appears to have been tried on this theory, and the principal matters submitted for decision concern the instructions of the court on the measure of damages.

The jury were instructed for the plaintiff upon the basis that the proper measure of damages was the difference between the rent and value of the leasehold premises with a good and permanent wall standing, and their value in the condition in which they were left without such wall.

The defendant's instructions were predicated upon the rule that only the actual damages resulting directly from the defendant's default in relation to the stone wall, to be measured by what it would cost to rebuild the wall, together with any loss that may have been sustained as the direct and immediate consequence of the insufficiency of the wall and the breach of the covenant, could be recovered.

The jury found a verdict for the plaintiff for \$4,750 damages, and upon a *remittitur* of \$2,375 the defendant's motion for a new trial was overruled, and a judgment rendered for the balance.

Under these covenants, it might admit of serious question whether the plaintiff, after he had accepted the wall without remonstrance, and safely occupied the premises for two years, was not bound under the covenant for repairs to rebuild the wall himself, or at least to put and keep it in a state of repair, charging the defendant with damages only for the original deficiency of structure. But it appears to have been left to the jury under the instructions to say whether the covenant for the building of a wall had been complied with, and whether the plaintiff had sustained damage in consequence of a breach thereof; and the case will be considered here only on the matter of the damages.

Upon the facts of the case, we think the instruction given for the plaintiff allowed a larger latitude and measure of damages than the justice or the law of the case will warrant, and that the rule given in the defendant's instructions should have been adopted.

In *Vivian v. Champion*, 2 Ld. Raym. 1125, it was said that the proper measure of damages in a breach of such covenants was what it would cost to put the premises in repair. This rule appears to have been slightly modified in some modern cases on covenants by tenants for repairs, but, as we conceive, not to the extent implied in this instruction for the plaintiff.—*Smith v. Real*, 9 Excheq. 165; *Penley v. Watts*, 7 Mees. & W. 601; *Worcester v. Rowland*, 9 Car. & P. 739; *Walker v. Swayzee*, 3 Abb. Pr. 136. It has been said to cover such damages as are direct and immediate, but not remote, speculative or contingent damages, or such as might have been avoided by the other party—*Damon v. Loker*, 17 Pick. 288. It has been allowed to include such losses in addition to the actual cost of repair as were necessarily sustained during the periods required for making repairs, and some compensation for any loss of the use of the premises whilst they were undergoing repairs—*Middlekauf v. Smith*, 1 Md. 327. But we find no satisfactory authority for the position that the tenant in such case may wholly neglect to make the necessary repairs himself, allow his leasehold to depreciate in value, or his business to be broken up and abandon his lease, and then claim for his damages the whole loss so incurred. The greater part of such damages as these might have been avoided, and are to be attributed to his own fault; and for that he must be content to bear the loss himself—*Thompson v. Shattuck*, 2 Metc. 615. As a general rule, we think it may be said that the recovery must be confined to the actual damages, which are the direct, immediate or proximate, and unavoidable consequence of the breach of the covenant—*Sedgw. Dam.* 195-9.

The evidence shows that this wall might have been rebuilt at a cost of some six or eight hundred dollars, and we are inclined to think that the plaintiff has recovered a larger amount than he was justly entitled to claim, notwithstanding the *remittitur*.

For these reasons the judgment will be reversed and the cause remanded. The other judges concur.

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Chambers' Adm'r v. Wright's Heirs.

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THOMAS L. STURGEON, Administrator of WILLIAM CHAMBERS, deceased, Appellant, v. ORLEANA C. SCHAUMBURG *et als.*, Respondents.

1. *Covenant—Heirs—Administrators.*—A., B. and C. having made partition among themselves of land which they held as tenants in common, made an agreement under seal, that in case of any suits being prosecuted by or against either of them involving the title under which they claimed, the expenses should be equally borne by the parties, and for the performance of this agreement they bound themselves, their heirs and personal representatives. After the death of all the parties, suits involving the title of their grantors were prosecuted by and against the heirs, and the administrator of C., who sued the heirs of B. for contribution. *Held*, that the covenant was personal, affecting only the acts of the parties themselves, and did not extend to the acts of the heirs in prosecuting or defending suits.
2. *Lands—Heirs—Administrators.*—At the death of a party his lands descend to his heirs or devisees, and the personal representative takes no interest therein but a naked power to sell for the payment of debts. The possession of the land as well as the defence of the title belong to the heirs or devisees alone, and the administrator has nothing to do with it.

*Appeal from St. Louis Circuit Court.*

*B. A. Hill*, for appellant.

*Glover & Shepley*, for respondents.

HOLMES, Judge, delivered the opinion of the court.

The case comes to this court by appeal from a judgment on demurrer to the petition. The suit was founded upon a written contract under seal between William Chambers, William Christy, and Thomas Wright, dated Aug. 30, 1830. The parties had previously made a partition among themselves of a tract of land held by them as tenants in common under Louis Labeaume, and the general tenor of the contract related to costs and expenses to be incurred in prosecuting or defending the title to the lands so divided in partition, and to the equalization of losses which might be sustained by reason of defects in the title; and the particular clause which was made the foundation of this action read as follows: "And in the event of any suit or suits being prose-



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cuted by or against the parties aforesaid, or either of them, involving the title of the original grant to Louis Labeaume, the expenses shall be equally borne by the parties hereto." The previous clauses related to suits and matters then pending and existing; the whole contract terminating with this clause, "for the performance of which we bind ourselves, our heirs, executors, and administrators."

The suit is brought by the administrator of William Chambers against the heirs and devisees of William Christy, who died in 1837, and for expenses of suits concerning the title to said lands which were prosecuted or defended by the administrator after the decease of the original party whom he represented.

We think the demurrer was well taken. The contract concerned the personal acts of the persons named only, and related to suits to be prosecuted by or against them or either of them, and at least commenced during the life of the party concerned, and to expenses which should be incurred in such suits. It did not embrace suits and expenses which should arise after the decease of the contracting parties, and be prosecuted or defended by their heirs and devisees, or legal representatives. The whole scope of the agreement was confined to the immediate parties, to acts to be done by either one of them, and to suits which were at least begun to be prosecuted or defended by him in his lifetime and to the expenses to be incurred therein. If any demand had arisen upon a breach of this contract in favor of William Chambers in his lifetime, or after his decease, it would doubtless have been a debt against the other parties or their estates. No such demand ever arose or existed under the contract, upon this petition.

If the suits in which the expenses sued for were incurred had been commenced by or against William Chambers in his lifetime, there is authority for saying that his administrator might have been bound to go on with them to their termination, and that all the expenses incurred therein, either before or after his decease, would have been incurred un-

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der this contract and by authority of its provisions, and that the debts thus created against the other parties, or their heirs, devisees, and legal representatives, would have been assets of the estate of William Chambers for which his administrator might sue in his representative capacity; for this would not have been a personal engagement merely to be performed by the party himself only, depending upon his personal judgment, skill and taste, and it might have been implied that he undertook and covenanted to prosecute or defend such suit to the end, and that the other parties covenanted to pay to him or his personal representatives their respective proportions of the expenses to be incurred therein—*Marshall v. Broadhurst*, 1 *Cromp. & Jer.* 403; *S. C.* 1 *Tyr.* 348; *Siboni v. Kirkman*, 1 *Tyr. & Gr.* 777; *Edwards v. Grace*, 2 *Mees. & W.* 190; *Chit. on Cont.* 98. Wherever the testator is bound by the covenant, his executor or administrator is bound also, unless it be such a covenant as was to be determined by his death, or was to be performed by him in person; he is not bound by a covenant for the personal act of the testator, unless there be a breach in his lifetime, but he may be bound to do a personal thing which the testator undertakes to do, and which is not determined by his death, but may be performed or completed by his personal representative, who may be said to represent him as to the performance of covenants which are by covenants to be performed, as well after as before his decease, but not as to covenants never made or things which he never undertook to perform at all—2 *Wms. Ex'rs*, 1487; 3 *Com. Dig.* (tit. *Cov. C* 1) p. 263, & *B* 1, p. 260; *Thurseden v. Warthen's Ex'r*, 2 *Bulst.* 158; *Cro. Eliz.* 553; *Hovey v. Newton*, 11 *Pick.* 42; *Labarge v. McCausland*, 3 *Mo.* 585.

The party here did not covenant that he would prosecute or defend all such suits as might thereafter be brought, nor that he would pay the expenses thereof; and it is not the case of a breach of covenant on his part to be performed. The contract is to be construed with reference to the subject matter and according to the intentions of the parties—*Browning v.*

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Wright, 2 Bos. & P. 13; Sto. on Cont. § 567. We cannot add anything to the terms in which it is expressed. It may be understood as a power given to incur expenses in any suit prosecuted by or against either of the parties involving the title in question, and to charge the other parties with their respective portions thereof. The charges so authorized are made a debt against them, for the payment of which they bind themselves, their heirs, executors, and administrators. This power is given to William Chambers, but not to his heirs or legal representatives; they are not named or designated in the contract as grantees of any such power. It is not said that his heirs or legal representatives may incur such expenses at their charge, nor that they, their heirs, or legal representatives, would be liable for the expenses of all suits that might be commenced, or prosecuted, or defended, after the decease of all the immediate parties by such heirs or legal representatives in all future time. The expenses sued for were incurred after the decease of all the original parties to the contract. We do not see how the administrator could derive any authority from this instrument to prosecute or defend these suits, or to incur the expenses, at the charge of the defendants or their ancestors; and it is needless to inquire by what authority he did actually proceed. The real estate descended to the heirs or passed to the devisees; the personal representative takes no interest in the lands descended, but a naked power to sell for the payment of debts, and the possession as well as the defence of the title belongs to the heirs and devisees. The administrator had nothing to do with it—Aubuchon v. Lory, 23 Mo. 99.

This does not belong to the class of covenants which run with the land and concern the tenure and enjoyments of the property conveyed. It is purely a personal and collateral covenant; and there is no such privity of contract between the parties here as can bind them any further than they are expressly bound by the terms of the written instrument—Hund v. Curtis, 19 Pick. 459; 2 Washb. Real Prop. 16; 1 Smith's Lead. Cas. (4th ed.) 118; 3 Com. Dig. (tit. Cov. C

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3 & A 2) pp. 256-65. There is no debt against the defendants or their ancestors, arising under the contract, which would be assets to be recovered by the plaintiff; and it is therefore unnecessary to inquire in what manner any such debt could be enforced against these defendants, as heirs and devisees, after administration closed.

Judgment affirmed. The other judges concur.

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THOMAS L. STURGEON, Administrator of the Estate of WILLIAM CHAMBERS, dec'd, Appellant, v. ORLEANA C. SCHAUMBURG et als., Respondents.

*Appeal from St. Louis Circuit Court.*

*Hill & Jewett*, for appellant.

*Glover & Shepley*, for respondents.

HOLMES, Judge, delivered the opinion of the court.

This case is, in all material respects, similar to that of Chambers' Adm'r v. Wright's Heirs, decided at this term, and for the same reasons given in the opinion in that case the judgment will be affirmed. The other judges concur.

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GREEN B. WADE, Plaintiff in Error, v. HENRY W. BELDMEIR, CLEMENS C. HARTMANN, and ROBERT ROENTGEN, Defendants in Error.

*Equity—Substitution—Conveyances—Notice.*—A., without actual knowledge of an attachment, purchased land subject to the encumbrance of a deed of trust, which was paid out of the purchase money and released upon the record, the title having been reported upon as subject only to the encumbrance of the deed of trust. Under the judgment in the attachment suit the land was subsequently sold. *Held*, that A. had no equity, to have entry of satisfaction set aside, to be substituted in the place of the original *cestui que trust*, and to have the property sold to pay the amount originally secured by the deed of trust; and that he must be treated as a purchaser with full notice.

*Error to St. Louis Circuit Court.*

*Garesché & Mead*, for plaintiffs in error.

*Woerner & Kehr*, for defendants in error.

FAGG, Judge, delivered the opinion of the court.

Plaintiff in error instituted a suit in the Circuit Court of St. Louis county, claiming to be an innocent purchaser in good faith of certain real estate situate in the city of Saint Louis. It is alleged that he purchased the same supposing it to be free from all charges and encumbrances, except a deed of trust to secure an amount less than the price paid for the property. The debt secured by this deed of trust was paid off and discharged out of the purchase money, and satisfaction entered of record by the trustee. It was further averred that, previous to his purchase, he caused an examination to be made by a skilful and competent conveyancer for the purpose of ascertaining the condition of the title, and this deed of trust was reported to be the only obstacle in the way of securing a complete and perfect title to the premises. In point of fact, however, a creditor of the parties of whom the purchase was made had previous thereto instituted a suit against them by attachment, and a levy was made upon this identical property. This suit was prosecuted to a judgment and the property sold by the sheriff of St. Louis county, the creditor being the purchaser at said sale. The trustee, *cestui que trust*, and the attaching creditor, are all made parties defendant, and the court asked to make a decree setting aside the entry of satisfaction of the deed of trust, subrogating the plaintiff to all the rights of the *cestui que trust*, and directing the trustee to resell the property so as to repay the plaintiff the amount of his purchase money. The court rendered judgment for the defendants upon a demurrer to the petition, and the case is brought here by writ of error.

There was no averment in the petition to the effect that unless the decree should be made as prayed for the plaintiff would be left without a remedy. There was no pretence of

any fraud on the part of any person made a party to the suit. The only ground of relief stated is the fact that an attaching creditor had secured a prior lien upon the property and afterwards perfected the same by a sheriff's sale, and that plaintiff had no actual knowledge of these facts.

The case of Vallé's Heirs v. Fleming's Heirs, 29 Mo. 152, is relied upon as settling this question in favor of the plaintiff. The claim of the plaintiffs in that case, however, rested upon equity, altogether different from that presented here. The principle settled in that case, as well as all of the authorities cited in support of it, was simply that where the purchase money paid for real estate, under a sale afterwards held to be void, had been applied to the extinguishment of a mortgage to which the same was subject in the hands of the owner, such purchaser should be subrogated to the rights of the mortgagee to the extent of the money so applied. In other words, that the true owner could not avail himself of the benefit of a payment made by a purchaser under a void sale and recover the property without compensation to such purchaser to the extent of his payment.

The case at bar may be one of great hardship, but we fail to discover any equitable ground of relief in the petition. It is different from the case cited, in the fact that the plaintiff must be treated as a purchaser with full notice. The attaching creditor does not sustain the same relation to the property that the heirs did in that case. They were seeking to recover against innocent purchasers for a valuable consideration at a sale made by the administrator for the express purpose of raising money to pay off a mortgage upon the land of his intestate. The discharge of this encumbrance with the money of the purchaser at the sale was held to be a payment directly for their benefit, and that it would be inequitable to permit them to recover the property without repayment of the purchase money. According to the petition in this case, the suit by attachment was commenced something like two months before the date of plaintiff's purchase. As to the attaching creditor, this plaintiff must be held to



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be a mere volunteer and not entitled to the relief prayed for. The court committed no error in sustaining the demurrer, and its judgment must be affirmed.

The other judges concur.

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WALTER B. MORRIS and JAMES D. MORRIS, Appellants, v.  
BALZER HAMMERLE, Respondent.

1. *Evidence—Practice—Deceased Witness.*—The testimony given by a deceased witness at a previous trial cannot be read from the bill of exceptions without laying the proper foundation for its introduction, by proving by the testimony of a witness competent to testify, the accuracy of the minutes of the testimony of the deceased witness; the substance of what the witness swore to must be proved like other hearsay evidence.
2. *Landlord and Tenant—Attachment.*—In an attachment under the Landlord and Tenant Act, the intention of the tenant in removing personalty from the premises is immaterial; the proper question is, does the removal of the property endanger the rent of the landlord?

*Appeal from St. Louis Circuit Court.*

*Leverett Bell*, for appellants.

*Woerner & Kehr*, for respondent.

FAGG, Judge, delivered the opinion of the court.

This was an attachment suit instituted in the St. Louis Circuit Court, under § 26, ch. 94, R. C. 1855. The provisions of this section of the act in relation to Landlords and Tenants were considered by this court in the case of *Kleun v. Vinyard*, 38 Mo. 447. The ground upon which an attachment is authorized to issue against the property of the tenant does not involve a question of intention, but one of fact. It was so held in the case referred to. In such cases, if it is found by the jury as a matter of fact that the actual or intended removal of the property from the premises would endanger the landlord in the collection of his rent, it will be sufficient to justify the suing out of an attachment.

The verdict in this case was for the defendant, and the plaintiffs bring this case here by appeal.

The first assignment of error relied upon by the appellants is the exclusion of the testimony of a deceased witness given upon a former trial of this case and preserved in a bill of exceptions. After proving the death of the witness, plaintiffs offered to read the testimony as there stated without laying any other foundation for its introduction. The court committed no error in excluding it in that shape. There is no question about the competency of such evidence. The principle is well recognized in the text books and also in the reported decisions of the courts; but the substance of what was sworn to by such witness must be proved, like all other hearsay evidence, by the testimony of a witness who can swear to its correctness. If notes of the testimony of such deceased witness are relied upon, then there must be a witness competent to testify and able to swear to their accuracy. The principles involved in this question were considered at length and carefully stated in the opinion of this court in the case of Jaccard et al. v. Anderson, 37 Mo. 91. The examination of this point is not essential except for the purpose of settling the rule of evidence in such cases. The testimony of this witness seems to have been cumulative merely, and contained no new fact bearing upon the issues in the case.

Two declarations of law were given by the court, one at the instance of the plaintiffs and one for the defendant. On behalf of the plaintiffs, the jury were told, without any qualification whatever, that if they believed from the evidence that at the time of the commencement of the suit defendant was removing or intended to remove his property, or within thirty days previous thereto had actually removed his property from the leased premises, they should find for the plaintiffs. This statement of the law was entirely too broad. It should have been so far qualified as to make the right of plaintiffs to recover in this form of action to depend upon the further fact that they would thereby be in danger of losing their rent.

The following is the instruction given for the defendant:  
"The taking away and selling portions of the produce of the

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farm in the usual and ordinary course of business is not a removal of the tenant's property so as to justify an attachment." It is admitted that this instruction taken by itself would be objectionable. Taken in connection with that given for the plaintiffs, it left the jury to find from the evidence in the cause, whether as a matter of fact there was still property enough left upon the premises, after the removal and sale of the produce stated by the witnesses, to secure the landlord in the payment of his rent.

Upon an examination of the whole case, we are not disposed to disturb the verdict.

The judgment will be affirmed. The other judges concur.



WILLIAM BALLENTINE, Respondent, v. THE NORTH MISSOURI  
RAILROAD COMPANY, Appellant.

1. *Bailments—Carriers—Railroad Corporations.*—The amount of business ordinarily done by a railroad is the only proper measure of its obligation to furnish transportation: if, from any reason, there is a sudden influx of freight demanding transportation, the obligation will be met by shipping the freight in the order of time in which it is offered. The freight is to be shipped in the order of time in which it is offered at the particular station, and not with reference to the entire line of the road; but no one station should be furnished with means of transportation to the prejudice and injury of another. The cars should be distributed among the different stations in proportion to the business ordinarily done, so that all freight may be shipped in a reasonable time.
2. *Bailments—Carriers—Railroad Corporations—Negligence.*—A carrier cannot be held liable for negligence if he be prevented from performing his duty by the act of God. A snow storm which blocks up a railroad to the extent that it hinders and delays the running of cars, is such an act.
3. *Bailments—Carriers—Negligence—Damages.*—Carriers are responsible for the natural, ordinary and proximate causes of their acts, but not for such as are remote and extraordinary. The delay occasioned to a plaintiff attempting to ship hogs, and the necessary expenses in feeding and taking care of the same, would be the natural and immediate consequence of the wrong done by the carrier in refusing to receive and ship the freight, but this cannot be said in reference to the loss occasioned either by the death or shrinkage in weight of the hogs, unless it appear that these effects were in some manner caused directly by the act of the carrier.

*Appeal from St. Louis Court of Common Pleas.*

Instructions given for the plaintiff :

1. The court tells the jury that on the 15th day of December, 1863, and from thence till the — day of January, 1864, it was the duty of defendant to furnish sufficient accommodation and rolling stock for the transportation within a reasonable time of all freight and live stock that were offered for transportation at the place of starting, at the junction of other roads, at the several station houses and stock yards on the road, and take the same without any unnecessary delay in the order in which such freight and live stock were offered, and transport the same to any place on the line of said road, or to such point on said road as the shippers or consignees should designate; and if they should believe from the evidence that plaintiff had at Allen, a station on said road, on the 15th day of December, 1863, 500 pork hogs that he designed to ship to St. Louis, on defendant's road; that on said last named day the freight agent of defendant at Allen was notified thereof and requested to ship said hogs; that said hogs were kept at said station a reasonable time awaiting shipment, and that plaintiff was ready and willing to pay the freight thereon; that for want of such sufficient accommodations defendant neglected and refused to ship said hogs within a reasonable time, they will find for plaintiff, unless they shall further believe from the evidence that there was a sudden, unforeseen and unsuspected influx of freight and live stock at the several stations on the road beyond the capacity of the rolling stock on the road to carry away in a reasonable time, which prevented defendant carrying plaintiff's hogs in such a reasonable time and in the order in which they were offered.

2. What is a reasonable time in which freight like that in controversy should be shipped after it is offered, is a question for the jury to determine, and in so doing they should take into consideration all the circumstances detailed in evidence.

3. That on the 1st day of December, 1863, and until the

23d day of January, 1864, it was the duty of defendant, within a reasonable time and without unnecessary delay, to ship all the freight and live stock that should within the time aforesaid be offered for transportation at the several stations and stock yards on said road to any other place on their line of said road, or to such point on said road as the shipper or consignee should designate, and in the order of time such freight and live stock were offered for transportation at the several stations and stock yards on said road. And if they believe from the evidence that plaintiff had on the 15th day of December, 1863, at Allen, a station and stock yard on said road, 500 pork hogs that he desired to ship on said road to St. Louis, and was ready and offered to pay the freight thereon, and so informed the freight agent at Allen; that said hogs remained at said station until about the 17th day of January, 1864, ready for shipment, and that between the days last aforesaid the defendant might and should have shipped the said hogs according to the rule above stated, but that during the said time defendant neglected and refused to ship said hogs, and did ship live stock for other persons which had been driven to and first offered for shipment at any of the stations and stock yards on said road after the plaintiff's hogs were so offered, to the prejudice of plaintiff's right to have his hogs shipped in the order of time in which they were offered for shipment at said Allen station, then they will find for the plaintiff on the fifth count in the petition. And if they also find that said hogs were afterwards, on or about the 23d day of January, 1864, shipped by defendant from Martinsburg station, on said road, the measure of damages will be the expense of keeping, feeding and taking care of said hogs from the day on which they should have been shipped till the day they were shipped, as also the loss incurred in the shrinkage in weight of said hogs between the times last aforesaid, if any, and also the loss occasioned by the dying of any of said hogs by reason of such delay in shipping said hogs from the day they should have been shipped till said 23d day of January, 1864, provided they find from the evi-

dence that said shrinkage in weight and death of hogs were not occasioned by any want of care on the part of plaintiff in feeding and taking care of said hogs.

4. If the jury believe from the evidence that on the 18th and 19th days of January, 1864, defendant received two car loads of dead hogs at Allen station, to be delivered to plaintiff in St. Louis, and that defendant failed and neglected to deliver said hogs in St. Louis or elsewhere to plaintiff, they will find the issue on the second count for the plaintiff, and will assess his damages at the value said hogs have been proved to be worth ; and if they further find that Chapman, the station agent at Allen, assumed to pay the freight on said dead hogs to said company, and said company accepted such assumption and held Chapman responsible therefor, they will also find the amount of such freight for plaintiff.

5. If the jury believe from the evidence that on the 23d day of January, 1864, defendant received on one of its freight trains 17 dressed hogs in good order, to be thence transported to St. Louis within a reasonable time, and that defendant failed and neglected to so deliver said dressed hogs in St. Louis or elsewhere, to plaintiff, within a reasonable time, they will find the issue on the third count for the plaintiff, and assess the damages at the amount proved to have been sustained by plaintiff by reason of such failure and neglect.

Plaintiff's instruction refused :

1. To constitute such sudden, unforeseen and responsible influx of freight and stock a defence to this suit, it must appear that defendant had used and run as much rolling stock as could be used and run on the road with safety to its operations.

Defendant's instructions given :

1. The jury are instructed that there is no evidence before them which is sufficient in law, if true, to warrant them in finding a verdict for the plaintiff on the first count of his said petition, founded on a supposed special contract.

2. If the jury believe from the evidence that the plaintiff



shipped on said road the dead hogs in the second count of his petition mentioned to be carried to St. Louis, and that the same were carried and delivered to the plaintiff or his agent at St. Louis, or that the same were deposited in the warehouse or usual place where such freight is placed, and that the plaintiff or his agent had notice or knowledge of the arrival of said hogs at such place ready for delivery to him, or of the time when said hogs would arrive there, they will find for defendant on said count.

3. If the jury believe from the evidence that the loss in said dressed hogs (in the third count of said petition mentioned) was occasioned by the warmth of the weather, and the natural and inherent infirmity and tendency of such freight to damage under the influence of a change in the weather from cold to warm, and not by any carelessness or negligence on the part of the defendant, its officers or servants, they will find for the defendant.

Defendant's instructions refused:

1. The jury are instructed as to damages in case they find for plaintiff on either the fourth or fifth count of said petition, that if they believe from the evidence that said hogs, or any of them, died from freezing, or the effects of excessive cold in the weather, or were smothered by piling together in consequence of such cold in the weather, or died through want of proper care on the part of the plaintiff or the persons having charge of them, they will not include the value of such hogs in their assessment of damages.

2. The jury are instructed as to damages in case they find for plaintiff on either said fourth or fifth count, that if they believe from the evidence that the loss by shrinkage in weight of said hogs, or any of them, was occasioned by insufficient feeding or want of proper care on the part of plaintiff or the persons having charge of them, or by the effect of excessive cold in the weather, they will not include any such loss in their assessment of damages.

3. The jury are instructed that if they believe from the evidence that previous to said month of December, 1863, the

defendant had furnished and had on said road sufficient accommodation and rolling stock for the transportation of all freight and live stock that was ordinarily and generally offered for transportation on said road within a reasonable time after the same were offered, and that during said months of December and January the defendant kept all of its available accommodation and rolling stock employed with reasonable diligence in receiving and transporting the freight and live stock that were offered for transportation on said road; that during said month of December there was an unusual influx and an extraordinary press of freight and live stock for transportation on the road beyond the capacity of the road and all accommodations and rolling stock to receive and transport immediately and at once, and that while the said hogs of plaintiff (in the fifth count in his petition mentioned) were waiting to be received in turn after they were offered for transportation, in the order of time and priority in which they were so offered, there occurred along the line of said road a severe and unusual snow storm and great cold, obstructing the operation of said road and hindering it from thereafter receiving and transporting said hogs of the plaintiff in the order of time and priority in which they were offered for transportation thereon, then defendant is not liable on the ground and for the reason merely that the plaintiff's said hogs were not received and transported (even if they were not) in the exact order of time and priority in which they were offered, in view of the operations and business of the whole road, at all the stations, junctions, and stopping-places thereon.

*Moss & Hunton*, and *Orrick*, for appellant.

It will be observed, this action is simply for a breach of contract, and the only questions therefore presented for decision of the court are—1. Was there a breach of contract? 2. If so, what is the measure of damages?

I. As to the first point, it will not be disputed that if the delay in shipping the hogs arose from any of the causes for

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which the law exonerates the carrier, there will be no breach. Applying this test, what were the operating causes?

1st. That defendant's rolling stock was sufficient for its usual and ordinary business.

2d. That there was an unusual, unsuspected and unprecedented influx of live stock on defendant's road, and also that a violent snow storm had interfered with and obstructed the business operations of the same, contributing with other causes (as the extreme cold forming ice, &c.) to the delay in plaintiff's shipment.

But either, or both of these causes conjoined, excuse or exonerate the carrier as to delay. The snow storm and cold certainly, being the "act of God," affords a perfect defence to a loss, and a *fortiori* to a delay. As to time, the carrier is not an insurer. The carrier may excuse delay by accident or misfortune, although not inevitable or produced by the "act of God"—Redf. on Railw. 318-19, & notes; 14 Wend. 210; Ang. on Carr. § 289; Hadley v. Clark, 8 T. R. 259; 2 Kern. 250-1; Conger v. Hudson River R.R. Co., 6 Duer, 375; Gal. & Chic. Un. R.R. Co. v. Rae et als., 18 Ills. 489; Weibert v. N. Y. & Erie R.R., 19 Barb. 36.

II. This being for breach of contract, the damage allowed should be such alone "as may fairly be considered as having been in the contemplation of the parties at the time the agreement was entered into." This is a rule borrowed from the civil law, and has all the advantage of greater simplicity and certainty than the somewhat arbitrary formula of "natural and proximate consequence," besides more closely following the analogies of law in the construction of contracts in which the intent is to govern.

There is this difference, however: while in the civil law prominence is given to fraud in questions of damage, it is not so in common law as borrowed therefrom. The question simply is, was there a breach? This test, as first laid down, is supported by the following authorities, and seems to be the tendency in modern decisions: Sedg. on Dam. 116; id. 61-78; 2 Smith's Lea. Cas. 537 et seq.; Redf. on Railw. 234,

§ 125; 6 Barb. (S. C.) 425; Hadley v. Bafendale, 26 Eng. Law & Eq. 398; S. C. 9 Exch. 341; Blanchard v. Ely, 21 Wend. 348; Masterson v. Mayor, &c. Brooklyn, 7 Hill, 68; Fox v. Harding, 8 Cush. 524.

Applying this test, can it be supposed that "in the contemplation of the parties" such a storm and extreme cold was imminent, and that such results would follow? Had it been shown or urged that to avoid the storm, or in contemplation thereof, the shipment was desired, there might be some reason for the claim urged by plaintiff; but such is not the case. It was a winter unprecedented for its storms and severity, and how, then, could it have been in the minds of the parties? Could its effects be foreseen? There is no foundation for the supposition that such damages as alleged in plaintiff's petition could have been contemplated as springing or arising from any breach of contract in shipping. But under either theory the damages claimed were too remote; the loss by death and shrinkage was from the excessive cold. Morrison v. Davis Co., 2 Penn. 171; Vedder v. Hildreth, 2 Wis. 427; Denvy v. N. Y. Central R.R., 13 Gray, 481; Darwin v. Potter, 5 Denio, 306; Clark v. Pacific R.R. 39 Mo. 184. Defendant's 1st and 2d instructions should therefore have been given, as they embodied the law as applicable to the case; and plaintiff's instruction as to the measure of damages should have been refused.

*Hicks & Doniphan*, for respondent.

I. Whenever a charter is granted for the purpose of constructing a railroad, and the corporation is clothed with the power of taking private property in order to carry out the object, it is an inference of law, from the extent of the powers conferred and the subject matter of the grant, that the road is for the public accommodation—1 Amer. Railw. Cas. 350-2; Wooster v. Western R.R. Co., 24 Penn. 378; Sanford v. R.R. Co., 2 Kern. 246; Weibert et al. v. N. York & Erie R.R. Co., 19 Barb. 36; Pierce on R.R. Law, 414-15.

II. The public being so entitled to these advantages, it re-

sults from the nature of the right that the benefit should be extended to all alike; that no special favors should be granted to any man or set of men, and denied to others. See above authorities, and especially 24 Penn.

III. That although there are statutory provisions which in a manner define the duties and liabilities of defendant, yet that there are duties and liabilities other than those annunciated in the statutes, which the defendant is bound to do and perform; among which is one, that when freight, from any cause or causes, accumulates at the station houses and stock yards on the road, beyond the immediate capacity of the rolling stock of the road to carry away in a reasonable time after the same was and is offered for transport on the road, it is the duty of defendant to carry away such accumulated freight and live stock in the order and priority of time in which it was offered at the several stations and stock yards on the road; that is to say, that the freight and live stock first offered for shipment at any of the stations and stock yards on the road should be first shipped—24 Penn. 378; 2 Kern. 245, 252; 18 Ills. 489.

IV. It was and is the duty of defendant to ship the freight and live stock offered for transport on the road in the order and priority of time in which it is offered for transport at the several stations on the road; that is to say, that freight including live stock first offered for transport at any of the stations and stock yards on the road should be shipped before that subsequently offered for transport at any of these stock yards and stations on the road—24 Penn. 378; 2 Kern. 245, 254; Pierce on R.R. 414-15.

V. It was and is the duty of defendant to provide sufficient accommodation and rolling stock to carry away all the freight and live stock that was or is offered for transport at the several stations and stock yards on the road within a reasonable time after the same was and is offered. See the authorities above cited, and R. C. 1855, p. 435.

VI. A common carrier in order to claim exemption from liability for damages done to the goods in his hands in course

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of transportation, injured by what is called the "act of God," must be without a fault himself; his act or neglect must not concur and contribute to the injury. If he departs from his line of duty and violates his contract, and while then in fault and in consequence of that fault the goods are injured by the act of God, which would not otherwise have caused damage, he is not excused or protected—*Reed v. Spalding*, 5 Bosw. (N. Y.) 395, 406, 408; *Wash v. Homes*, 10 Mo. 15; *Collier v. Valentine*, 11 Mo. 307; *Smith et al. v. Whitman et al.*, 13 Mo. 352; *Hill v. Sturgeon*, 28 Mo. 327; *Davis v. Godnett*, 6 Bing. 716; 3 Kent, 210; *Hart v. Allen et al.*, 2 Watts (Penn.) 114.

FAGG, Judge, delivered the opinion of the court.

The law defining and regulating the duties of railroad companies as common carriers, is so well settled now as to admit of little doubt or controversy. As preliminary, however, to the determination of the questions involved in this case, it may be stated that the laws of the State require each railroad corporation to "furnish sufficient accommodations for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered for transportation," &c.—*R. C. 1855*, p. 435, § 44. The sufficiency of such accommodations must be determined by the amount of freight and the number of passengers ordinarily transported on any given line of road. The duty of a company to the public, in this respect, is not peculiar to any season of the year, or to any particular emergency that may possibly arise in the course of its business. The amount of business ordinarily done by the road is the only proper measure of its obligation to furnish transportation. If by reason of a sudden and unusual demand for stock or produce in the market, or from any other cause, there should be an unexpected influx of business to the road, this obligation will be fully met by shipping such stock or produce in the order and priority of time in which it is offered—*Galena & Chicago R.R. Co. v. Rae et al.*, 18 Ills. 488; *Weibert v. N.*



Y. & Erie R.R. Co., 19 Barb. 36. Any other construction of the statute would be unjust to the railroad companies without benefiting the public.

It seems to have been the theory upon which the petition proceeded in this case, that it was the duty of the defendant to have shipped the live stock in the order of time in which it was offered with reference to the entire line of its road, and not to any particular station. This is altogether unreasonable, and in its practical operation would work great hardships upon all companies. Its duty in this respect, then must be understood in reference to each particular station, and not to the operation of the road as a whole.

Whilst it may be difficult to lay down any general rule upon this subject sufficiently accurate in its terms to cover all cases that may possibly occur, still we think it can be approximated by saying that its means of transportation must be so distributed at the various stations for receiving passengers and freight along the entire line of its road, as to afford a reasonable amount of accommodation for all. Or, to state it differently, no one station should be furnished with means of transportation to the prejudice of another, but a distribution should be made among all in something like a just proportion to the amount of business ordinarily done at each. Its duty is to receive all freight that may be offered, and within a reasonable time, and in the order in which it is offered, to transport the same to any other point on the line of its road that may be designated by the owner or other person having charge of it. This duty to the public must be performed in good faith, and without partiality or favor to any one. Every individual in the community, by complying with the prescribed rules and regulations of the company, has an equal right to demand the performance of this duty, and the law does not excuse a discrimination in this respect any more than it does a discrimination in favor of any particular station on the line of its road. In every proceeding, therefore, against a railroad company for neglect of its duty, either in receiving or shipping freight in the order

in which it is offered, the good faith of its conduct in the matter complained of is a proper subject of inquiry, and if found to be wanting, should receive the severest condemnation and censure from the courts of the country.

The petition contains five counts, charging the defendant with neglecting its duty in failing and refusing to receive for shipment a large number of hogs offered at one of its stations called Allen, and also for failure to deliver a lot of dead hogs, and for failure to deliver, in a reasonable time and in good order, a certain lot of dressed hogs, all shipped at said station for the city of St. Louis. The first alleged a special contract for the shipment of a large number of hogs within a given period of time. Under the instructions of the court below, the issue on this count was found for the defendant. The second alleged a shipment of a large number of dead hogs from Allen station to St. Louis, and an entire failure of defendant to deliver any portion of them. The third was for a like shipment of 17 dressed hogs, not delivered in good order and within a reasonable time. The fourth and fifth counts simply varied the statement of the same cause of action substantially. The jury, in the verdict, returned a separate finding and assessment of damages under each of the last four counts in the petition. This finding was stated to be what was understood to be their duty under the instructions of the court, and coupled with the further statement that their intention was to assess the whole amount of damages returned, \$3,728.78, under the third and fifth counts alone. Plaintiff thereupon elected to take his damages so assessed, and judgment was entered accordingly.

As to the finding of the jury on the third count there is no controversy here, and we pass to the consideration of the question as to whether the jury was properly directed as to the liability of the company and the measure of damages in such cases. Plaintiff's claim for damages on the fifth count was based upon the allegation that on or about the 15th day of December, 1863, in accordance with the rules of the com-

pany, he registered for shipment on said road and at said station 500 fat hogs ; that if all the hogs, then registered at said station, had in good faith been shipped in their proper order, his turn would have been reached by the 25th of said month ; that defendant acted with partiality in shipping for other parties hogs offered for shipment after the date at which plaintiff's hogs were registered, and that from said first mentioned date continuously on until the 17th of January following, his hogs, being at or near said station, were offered for shipment ; that at said last named date they were, by direction of the defendant's agents, driven to another station on the road, and shipped on the 23d of January, 1864 ; that during this period of time plaintiff expended a large amount of money in feeding and taking care of his hogs, that 120 of them died, and that he sustained heavy damages thereby, as well as in the shrinking in weight of the remainder.

These allegations were severally denied, with an averment in the answer that the means of transportation were sufficient to do the amount of business ordinarily required upon the road ; that there was at this period an unusually large quantity of live stock awaiting shipment all along the line of this road, and greatly beyond the capacity of defendant to receive and transport the same as it was offered, and, to add to the embarrassment of the company and in its inability to accommodate the public as speedily as it might otherwise have been done, there was, on or about the 31st day of December, an unusual snow storm, which, with the extreme severity of the weather that followed it, greatly obstructed defendant's road, and for the period of two weeks hindered and delayed the running of trains.

Of the series of instructions given at the instance of the plaintiff it will only be necessary to consider the third, the remainder being treated as substantially correct. An application of the principles enunciated in the preceding part of this opinion will demonstrate the fact at once that the first part of that instruction must be held to be erroneous.

The duty of the company to receive the plaintiff's hogs in

the order of time in which they were offered for shipment, is to be understood as referring to that station and not to all the stations on the road. As to whether the failure of defendant to receive and ship plaintiff's hogs in their proper order and within a reasonable time, was a wilful neglect or refusal to perform its duty, was a question of fact to be considered by the jury, with reference not only to its liability to furnish sufficient means of transportation for this purpose, but also in reference to any other fact that would be sufficient in law to excuse such failure. No argument or citation of authorities is considered necessary to establish the fact that the matter set up in answer by way of excuse, and to show that defendant for a portion of the time of which plaintiff complains was prevented from performing its duty, was, properly speaking, the act of God. The snow storm was described by the witnesses to the extent that it hindered and delayed the defendant in the performance of its duty, should have been considered by the jury. The testimony of John Ballentine, who was the brother and agent of the plaintiff, tends to show that the hogs could not have been shipped previous to the storm, and indeed down to the very time at which they were driven away to be shipped elsewhere. After stating that the 500 hogs mentioned were driven to Allen on the 14th of December, he says: "I understood there were eighty car loads there waiting for transportation when we got there; I thought we should not get through by spring." This was in his examination in chief. On cross-examination he said, "we got to Allen on the 14th of December. Mr. Salisbury had one or two car loads of hogs. *I dont think our turn would have come before we left in case Salisbury's hogs had not been taken.*" No testimony is preserved in the bill of exceptions that conflicts with these statements. With a showing so favorable to the defendant by the plaintiff's own testimony down to a period after the occurrence of this storm (which is described by the witnesses on both sides as one of great severity), the court should have told the jury that it was one of the facts in the case to be consid-

ered by them in determining whether or not the defendant was excused from his liability to receive the hogs within the period of time mentioned in the petition.

The only remaining point for consideration is the question of damages. The elementary books as well as the opinions of the courts attempt to lay down a general rule upon this subject, which is substantially, that carriers are responsible for the natural or ordinary and proximate consequences of their acts, but not for such as are remote and extraordinary—Sedg. Meas. Dam., 3d ed. 63; 2 Greenl. Ev. § 256; Clark v. Pacific R.R., 39 Mo. 184.

The general statement of the rule is easy enough, but the point of difficulty frequently is to ascertain whether a given case is within it or not. Here the act complained of is the failure to receive in its proper order of priority stock offered for shipment. If the bad faith of the defendant is made to appear, he is liable for whatever damages can be shown to have resulted to the plaintiff as the natural and proximate consequences of its act. The delay occasioned to the plaintiff, and the necessary expenses in feeding and taking care of the hogs, are therefore to be taken in such case as the natural and immediate consequences of the act. But this cannot be said in reference to the loss occasioned either by the death or shrinkage in weight of the hogs, unless it could be made to appear that these effects were in some manner caused directly by the act of the defendant.

The witness, John Ballentine, stated repeatedly in the course of his examination that "the freezing and piling caused the death of the hogs." His testimony in this respect is corroborated by all the witnesses. But very few of the hogs died previous to the occurrence of the storm, and the loss of the plaintiff in this respect, as well as the large amount of shrinkage in the weight of the hogs taken to market, was certainly the natural and proximate consequence of the storm, and not the failure of the defendant.

The snow storm being the act of God, could not have been anticipated by the parties, and in no sense could be called a consequence of the defendant's act.

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It was proper in the instructions to the jury to give some prominence to the fact that after plaintiff's hogs had been registered for transportation and out of the proper order of time, two car loads of hogs were shipped for Mr. Salisbury. This was an act of favoritism inconsistent with the duty of the defendant to the public, but it really cuts no figure in this case, for the reason that plaintiff showed by his own testimony that his turn would not have been reached before his hogs were driven away from that station, even if these two car loads had not been shipped. No part of the damages sustained by plaintiff could have been attributed, therefore, directly to this wrongful act.

The instructions asked by the defendant, and refused by the Court of Common Pleas, and numbered in the bill of exceptions as one, two, and three, ought to have been given.

For the giving of an improper instruction at the instance of plaintiff, and the refusal of those asked by the defendant, the judgment must be reversed and the cause remanded.

Judge Wagner concurs; Judge Holmes, having been of counsel in the court below, did not sit.



HANNAH LIDDY, Respondent, v. THE ST. LOUIS RAILROAD  
COMPANY, Appellant.

1. *Railroad Corporations—Negligence.*—The peculiar character of the vehicles employed by street railroads running through the crowded thoroughfares of a city makes it incumbent upon every company to exercise care and diligence to avoid collisions and accidents; no other rule can be recognized as compatible with the safety and security of the public. But this rule does not dispense with the care and prudence required of all persons using the street in common with the railroad company.
2. *Railroad Corporations—Municipal Corporations—Negligence.*—The ordinance of the City of St. Louis regulating the running of cars on the street railroads within the limits of the city, imposes certain duties on the companies, and the violation of such regulations shows negligence in the management of the cars on such roads.

*Appeal from St. Louis Circuit Court.*

This case was tried upon the issues made by the petition and answer.



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The plaintiff in her said petition, after alleging that she was the wife of Michael Liddy, and that the defendant was a corporation possessed of a street railway along Broadway and Fifth street in the city of St. Louis, averred "that it was the duty of said defendant at all times, when running their cars along said streets, to keep a vigilant watch for all vehicles and persons on foot, either on the track or moving towards it, and on the first appearance of danger to stop the cars in the shortest time and space possible, and to otherwise observe and perform all the municipal regulations and rules imposed upon said defendant by city ordinance No. 4564, entitled 'An ordinance in relation to street passenger railways,' approved December 27, 1859. But plaintiff says the said defendant, on or about the 31st day of December, A. D. 1864, wholly disregarding its duty in every respect and the provisions of the aforesaid city ordinance, by its agents, servants, and employees, so negligently, unskillfully and with criminal intent run and conducted one of its said cars along the aforesaid streets that the same was run over Michael Liddy, husband of plaintiff, as aforesaid, without any fault upon his part, whereby he was killed, and that his death resulted from the injuries then and there caused by the negligence, unskillfulness and criminal intent of the said defendant, its agents and servants as aforesaid, whereby and by reason of the statute in such cases made and provided defendant has forfeited and become liable to pay plaintiff the sum of five thousand dollars damages, for which she asks judgment."

Defendant by its answer to the amended petition put in issue the material allegations of the petition—denied negligence, carelessness or criminal intent on the part of its agents and servants—and averred that if Michael Liddy received the injuries complained of, it was in consequence of his own negligence and carelessness, and not through any fault of defendant.

Albert L. Allen, for plaintiff, stated that on the evening of the 31st of December, 1864, between 7 and 7½ o'clock, he

was standing on the west side of Broadway, opposite Bates street, when "a car of the Fifth-street railroad line was coming up defendant's track from the Arsenal, proceeding north towards Bremen; it was going at the rate of from seven to eight miles an hour, which is faster than they generally drive. It was a starlight night and the gas-lamp at Chapman & Thorpe's corner, as well as the lamp on the other side of Bates street, were lit. I could see a man a half square by that light, and a car or train at least a square or two off. \*

\* \* I saw deceased for the first time just before the horses' heads reached him; he was coming over from the east to the west side of the street; I had not noticed him before that moment of time; he hallooed, 'Oh!' fell, and the car passed over him. \* \* \* The car went on ten or fifteen yards after it run over him before it stopped."

Upon cross-examination, he stated that the deceased was just at the horses when witness first observed him; that he has seen cars run on Broadway, opposite his house, eight miles an hour every day; that he has at times seen cars driven as fast, and perhaps faster, than the car in question; that he has seen carriages driven through the streets faster than this car, and that he has never found it impossible to get out of the way of a carriage or car driven as fast as this car was driven at the time of the accident. Being interrogated whether he had not, at the previous trial, said he could not tell the rate of speed at which the car was going, he answered in the affirmative, and said that he "merely guessed" that they were going at that rate, being the rate of seven to eight miles an hour.

Hubert Schilt, plaintiff's second witness, said, that he and a friend of his, on the occasion in question, were on the east side of Broadway, about 80 yards north of Bates street; that he could see a man at Bates street, and a car 400 to 500 yds. off to the south. In reference to the occurrence itself, he said: "The car was coming up very fast, going from south to north; the man, who was afterwards killed, was in the street; he was going across the street, with chickens in one

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hand; he was going over the street kind of crossways towards the west. My friend said: 'If that man don't look out, he will be hurt.' The car continued on, and the man was struck either by the tongue or the horses; he fell and the car went over him; I saw him afterwards at the police station—he was dead."

On cross-examination, he stated: "When I first saw the deceased, he was about half way in the street between the curbstone on the east side of Broadway and the railroad track; the car was perhaps 40 or 50 yards from him, perhaps more—I can't say; he was going diagonally across the street; I can't say how far he was south of the flat-stone crossing on Bates street. \* \* \* He continued to walk on; I don't know whether he noticed the car or not; I don't know whether he saw it or heard it, but he did not stop; I can't say whether he stumbled and fell, or whether the horses or tongue hit him; he was run over."

Patrick Fleming said: "I was a passenger in the car that night, and felt a jolting as if the car was going over a big rock; it went over and 10 or 15 yards beyond; the car was going at fast speed." Quest. by plaintiff: "How many miles per hour was the car going at, at that time?" Objected to by defendant because "it does not appear that witness is competent to judge of the rate of speed of a street car, or that he has ever had charge of the running of a car, or any experience in the running and management of street cars which will enable him to form or express a correct opinion as to their rate of speed when moving." Objection overruled, to which defendant then and there duly excepted; and the question being repeated, the witness answered as follows: "The car was going at the rate of 7 or 8 miles per hour."

Cross-examination. "I did not know Michael Liddy in his lifetime. I have never had the management of a team; I am a laborer. The lamps were lit in the car. I don't know why I recollect that the cars were going fast, but I do recollect it. I have seen cars driven as fast, and carriages faster. I thought it was a rock on the track. When the car stopped,

we got out, and found the man on the track ; he was afterwards taken away."

This was plaintiff's testimony as to the occurrence ; she also introduced the coroner to prove the character of the injuries received by the deceased, and two witnesses to prove her marriage and the identity of the deceased, and closed.

At the close of the plaintiff's testimony, defendant asked the following instruction, viz. : 1. "Upon the evidence in this cause, the plaintiff is not entitled to recover"; which the court refused to give, to which defendant excepted.

Defendant, by three witnesses, offered evidence tending to prove that the car, on the occasion in question, was driven at a usual and moderate rate of speed not exceeding from  $4\frac{1}{2}$ -5 miles an hour ; that the signal lights were up in the car ; that the horses had bells on ; that the car was in proper condition, the brakes in good order, the horses properly geared, the driver and conductor at their posts and attending to their duty ; that the night was cloudy and foggy ; that when the car got near the south crossing of Bates street, the conductor, wishing to let out a passenger, rang the bell as a signal to the driver to stop, when the latter immediately applied the brakes, but, after giving them one twitch, the horses plunged forward, carrying the car with them and over an object, which afterwards turned out to be the deceased. The driver swore that "if a man had been standing up in the street, I reckon I could have seen him when I got near Bates street. I could not have seen a man lying on the track ; the night was dark, and that part of the street was not in the range of the lights. I kept a sharp watch on my horses and of the track ahead, but saw no man in the street. If he had been standing up in the street, I would have seen him. I did not notice anything until the horses jumped and jerked the car ahead."

It also appeared that the corpse of the deceased, after the car had passed over him, was lying about midway between the crossings in the centre of the street, with his head to the south and his feet to the north.

The plaintiff thereupon prayed the following instructions, which the court gave :

1. If the jury believe from the evidence that plaintiff was at the time of the injury to and death of Michael Liddy the lawful wife of said Liddy, deceased, and that said Liddy died from an injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of the defendant's agents or servants while running, conducting, or managing one of their cars, and deceased used ordinary or reasonable care at the time to prevent said injury, the defendant is liable in this action, and the jury will find for the plaintiff.

2. The fault or negligence of the deceased which will preclude a recovery by the plaintiff *if there was mutual negligence*, is not the least degree of fault or negligence, but it must be such a degree as amounted to the want of ordinary or reasonable care on the part of the deceased at the time of the injury. By ordinary or reasonable care is meant that degree of care which may be reasonably expected of a person in deceased's situation.

3. Although deceased may have been guilty of misconduct or negligence which contributed remotely to the injury, yet if the misconduct, negligence, unskillfulness or criminal intent of the defendant, its agents or servants, was the immediate cause of the injury, and with the exercise of prudence and care defendant might have prevented the injury, then it is liable and the jury will find for plaintiff.

4. If the jury find for the plaintiff, they will assess damages at five thousand dollars, that being the amount fixed by law.

5. The jury are to determine as to the credibility of the witnesses, and should give to the evidence of each just such weight as they may think it entitled to ; and if they believe any witness in the case has wilfully sworn falsely as to any material matter, they may disregard all of his or her testimony.

To the giving of which instructions, and to each and every one of them, defendant then and there duly excepted.

And defendant thereupon asked the following instructions, namely:

2. The jury are instructed that if the driver and conductor of the defendant's car were at their posts of duty, and were exercising that degree of care and prudence in the management of said car which men of common sense and common prudence ordinarily exercise under like circumstances, then there was no negligence on the part of the defendant, and the plaintiff cannot recover. If they should believe, however, that said driver and conductor, or either of them, did not exercise this degree of care or prudence, but were negligent and careless in the management of said car, then they will inquire whether there was any negligence or imprudence on the part of the deceased without which the injury could not have happened; and if they find that there was such negligence and imprudence on his part, then they will find for defendant, notwithstanding they may also believe that the agents and servants of defendants were guilty of negligence and carelessness.

3. If the jury believe that the deceased, before attempting to cross Broadway, could have observed the approach of the car, but failed to look or listen, this was negligence on his part; if he saw its approach and yet attempted to pass when it was so close upon him as to endanger his safety, this was likewise negligence, and in either case the plaintiff is not entitled to recover.

Which instructions the court refused to give; to the refusing of which defendant excepted.

And defendant also asked the following instructions:

4. To entitle the plaintiff to recover, she must prove affirmatively: First—That she was the lawful wife of Michael Liddy, deceased, at the time of the latter's death. Secondly—That the deceased was guilty of no negligence or carelessness on his part in the collision which caused his death. Thirdly—That his death resulted from injuries occasioned solely by the negligence or carelessness of the agents and servants of the defendant, and that he in nowise contributed



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to bring about the occurrence which caused his death ; and if the deceased in any way contributed to the injuries which produced his death, it is immaterial to inquire who was more in fault, whether the deceased or the defendant, for unless the deceased was entirely free from fault the plaintiff cannot recover. If the plaintiff has failed to establish any one of these propositions to the satisfaction of the jury, the verdict must be for the defendant.

Which instruction the court refused to give, but of its own motion interlined the same, and gave it to the jury as follows :

4. To entitle the plaintiff to recover, he must prove affirmatively : First—That she was the lawful wife of Michael Liddy, deceased, at the time of the latter's death. Secondly—That the deceased was guilty of no negligence or carelessness on his part in the collision which caused his death, *and which directly contributed thereto*. Thirdly—That his death resulted from injuries occasioned solely by the negligence or carelessness, *or criminal intent*, of the agents and servants of the defendant, and that he in nowise *directly* contributed to bring about the occurrence which caused his death ; and if the deceased in anywise *directly* contributed to the injuries which produced his death, it is immaterial to inquire who was more in fault, whether the deceased or the defendant ; for unless the deceased was entirely free from fault *as to any act which directly contributed to his death*, the plaintiff cannot recover. If the plaintiff has failed to establish any one of these propositions to the satisfaction of the jury, the verdict must be for the defendant.

To the giving of which instruction as interlined by the court the defendant then and there duly excepted.

Defendant also asked the following instructions, which were given :

5. If the jury believe that the death of Michael Liddy was the result of accident or misadventure, the plaintiff is not entitled to recover.

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6. If the jury believe that Michael Liddy either by accident stumbled and fell, or that he was knocked down by some force or agency before defendant's car reached him, and was run over in consequence of thus lying upon the track, and without the fault of defendant's servants, then the jury will find for defendant.

The case being submitted to the jury under the foregoing instructions as given by the court, a verdict was returned for the plaintiff in the sum of five thousand dollars.

*Woerner & Kehr*, for appellant.

I. The demurrer should have been sustained.

(a) The petition contains several causes of action contained in one count. The plaintiff seeks to recover for the violation of a city ordinance, and also for injuries arising from the negligence of defendant's servants—*McCoy v. Yaeger*, 34 Mo. 113; *Clark's Adm'r v. Han. & St. Jo. R.R.*, 36 Mo. 215.

(b) The petition states no cause of action under section 2 of the statute "for the better security of life, property, or character."

II. In order to recover, the plaintiff must show by affirmative proof, 1st, that deceased exercised ordinary care on his part; and 2d, that the injuries of which he died were the result of defendant's negligence. "These essential elements of such a cause of action are as absolutely distinct from and independent of each other as are the two opposing parties, and each and both must be *by itself* in the case upon the evidence or there can be no recovery"—*Wilds v. Hudson River R.R. Co.*, 24 N. Y. 32; *S. C.* 29 N. Y. (2 Tiff.) 315; *Gahagan v. B. & L. R.R. Co.*, 1 Allen, 187-90; *Spooner v. Brooklyn C. R.R.*, 31 Barb. 419; *Stinson v. N. Y. C. R.R. Co.*, 32 N. Y. (5 Tiff.) 333.

The instruction asked by defendant at the close of plaintiff's testimony, to the effect that plaintiff was not entitled to recover, should have been given.

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(a) There was no sufficient proof of defendant's negligence.

(b) There was absolutely no proof that deceased had exercised due care. "If the plaintiff fails to prove that he used due care to avoid the collision, the court should instruct that he is not entitled to recover"—*Shaw v. Boston & W. R.R.*, 8 Gray, 73; *Gehagan v. Boston & L. R.R. Co.*, 1 Allen, 187; *Denny v. Williams*, 5 Allen, 1; *Warren v. Fitchburg R.R.*, 8 Allen, 227; *Butterfield v. Western R.R. Co.*, 10 Allen, 532; 91 Eng. Com. L. 148-9; *Stevens v. Oswego R.R. Co.*, 18 N. Y. 422; *Toomey v. London R.R. Co.*, 3 C. B. (N. S.) 146; 29 Conn. 208-9; *Philad. R.R. v. Hammil*, 44 Pa. 375; *North Pa. R.R. v. Hilmann*, 49 Pa. 60; *Wilds v. Hudson River R.R. Co.*, 24 N. Y. 430; *Clark's Adm'r v. Han. & St. Jo. R.R.*, 36 Mo. 217; *Boland et ux. v. Mo. R.R. Co.*, 36 Mo. 484; *Smith v. Han. & St. Jo. R.R. Co.*, 37 Mo. 287.

The case of *Huelsenkamp v. Citizens' Railw. Co.*, 37 Mo., does not sustain the plaintiff. *Huelsenkamp* was a passenger. There is a broad distinction between defendant's liability to a passenger and its duty to a stranger. Towards a passenger the carrier must "use the utmost care and diligence, whilst as to third persons it is required only to exercise such care and skill as a person of ordinary prudence would use about his business. Towards the one his liability arises from a contract upheld by an adequate consideration; towards the other, he is under no obligations but that of justice and humanity"—*Broad v. Troy & L. R.R. Co.*, 8 Barb. 378-80, *R.R. Co. v. Norton*, 24 Pa. 465; *State to use, &c. v. Balt. & O. R.R.*, 397; *Bannon v. R.R. Co.*, 5 Amer. Law Reg. (N. S.) 473.

III. Defendant's third instruction should have been given. Before attempting to cross a railroad track, a man should make a reasonable use of his sense of sight as well as of hearing in order to ascertain whether he will expose himself to a collision. If he fails to use his senses without reasonable excuse, he fails to use reasonable care—*Butterfield v. Western R.R. Co.*, 10 Allen, 532.

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"It is the duty of a traveller when approaching the intersection of a railroad with a common highway to look out for approaching trains or engines, and if he fails to take this precaution he is guilty of negligence, and the court should so declare as a matter of law"—North Pa. R.R. Co. v. Hilmann, 40 Pa. (13 Wright) 60. To the same effect are Wilds v. Hudson Riv. R.R., 24 N. Y. 440; S. C. 24 N. Y. 328; Reeves v. D. & L. R.R. Co., 6 Carey, 464.

*Hudgens & Son*, for respondent.

I. The motion to strike out and demurrer to pleading having been overruled at October term, 1865, and no final judgment rendered on said action of the court below, and no bill of exceptions or appeal taken at said term, this court will not review such action on appeal from the judgment at October term, 1866—R. C. 1855, p. 684, § 11; id. p. 1287, § 11; 8 Mo. 619; 9 Mo. 269; 27 Mo. 422; 13 Mo. 455, & p. 4; 26 Mo. 67; 4 Mo. 456 & 622.

II. There having been no motion in arrest of judgment filed in the court below, this court will not review any errors now assigned in the pleadings—13 Mo. 455 & 215; 10 Mo. p. 515; 7 Mo. 416; 15 Mo. 143; 4 Mo. 438; 6 Mo. 50; 9 Mo. 624.

III. There being evidence of record from which the jury found their verdict, this court will not review their finding in the absence of any marks of fraud or malicious intent on the part of the jury. The jury are judges of the facts from the witnesses before them, and this court can only review questions of law—Meyer v. Pacific R.R., *ante* 153.

The 1st instruction given by the court at the instance of plaintiff declared the law properly. It is a statement of the statute under which this action was brought, with the addition of the modification given to it by the court, that "deceased must have used ordinary or reasonable care at the time in order to recover"—R. C. 1855, p. 647, § 2.

The 2d instruction given at the instance of plaintiff declared the law correctly. It was not the least degree of fault

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or negligence of deceased which would preclude the plaintiff from recovering, but it must have been such a degree as amounted to the want of ordinary or reasonable care in order to preclude plaintiff; and if he used ordinary or reasonable care he could not be deemed to have contributed to the injury, and the instruction was proper—*Huelsenkamp v. Citi-Railw. Co.*, 37 Mo. 537; 17 Barb. 94; 1 E. D. Smith, 36; 4 id. 21; 12 Cush. 197; 8 Gray, 79.

The 3d instruction given for plaintiff declared the law applicable to cases of mutual negligence correctly. Every leading case from *Lynch v. Meriden*, Q. B., down to the recent decision of *Huelsenkamp v. Citizens' Railw. Co.* and *Meyer v. Pacific Railw. Co.*, in this court, have affirmed the principle of the instruction that plaintiff can recover when his negligence was only the remote cause and that of the defendant the immediate cause of the injury. This is the settled law of every leading case.—English cases: *Lynch v. Meriden*, 1 Q. B. 29; 12 id. 437; 9 Car. & P. 601-13 & n.; 3 M. & W. 224; 10 id. 546; 1 Man. & Gr. 568; 5 Exch. 239-243.—American authorities: *Red. on Railw.* 330-1, marg.; *Huelsenkamp v. Citizens' Railw. Co.*, 37 Mo. 537; 34 Mo. 127, 177, 235; 3 Ohio, 172; 2 Amer. Railw. Cas. 118; 19 Conn. 566; 16 Conn. 420; 24 Vt. 487; 20 Ohio, 426; 9 Ohio, 397; 31 Miss. 156; 4 Zab. 824; 5 Denio, 255; 1 id. 91; 39 Me. 276; 22 Vt. 213, 224; 3 E. D. Smith, 103-9; 19 Conn. 507; 12 N. Y. 425-9; 9 Rich. 84; 23 Pa. 526; *Pierce R.R. Law*, 276; 4 Ohio, 474; 2 Pick. 621; 12 Metc. 417-18; 7 Cush. 155-61; 8 Gray, 131-2; 17 Barb. 94; *Meyer v. Pacific R.R.*, ante 153; *McKay v. N. Y. Central R.R. Co.*, Am. Law Reg. for May, 1867, p. 617.

The 2d and 3d instructions asked by defendant were properly refused by the court because they undertook to tell the jury what acts constituted negligence, which is the exclusive province of the jury to determine. The court would have usurped the functions of the jury if it had given either of them—*Huelsenkamp v. Citizens' Railw. Co.*, 34 Mo. 45, and

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37 Mo. 537 ; 19 Conn. 566 ; 33 Mo. 202 ; 6 Mo. 64 ; 10 Allen, 535 ; Meyer v. Pacific R.R., *ante* 153.

The law was properly and fully declared in the instruction given, and it was not error to refuse other instructions although they might have been good declarations of law—30 Mo. 191 ; 31 Mo. 585.

FAGG, Judge, delivered the opinion of the court.

The respondent recovered a judgment in the Circuit Court of St. Louis county for the killing of her husband, Michael Liddy. It was a suit for damages under the second section of the act entitled "An act for the better security of life, property," &c., R. C. 1855, p. 647. The defendant is a corporation owning and operating a street railway in the city of St. Louis.

Two general questions are presented by the transcript of the record in this case: 1. Was the defendant, through its agents and servants, guilty of the negligence charged? If so, 2. Did the conduct of the deceased indicate a degree of negligence on his part that contributed to produce the fatal result, and thereby relieve the defendant from liability?

It may be remarked generally in reference to these corporations, that the questions growing out of their relations to the public, and the measure of their duty in respect to the care and diligence necessary to be exercised by them have been carefully considered and stated in former cases decided by this court. See particularly *Kennedy v. North Mo. R.R. Co.*, 36 Mo. 351 ; *Boland et ux. v. Mo. R.R. Co.*, 36 Mo. 484 ; *Huelsenkamp v. Citizens' Railw. Co.*, 37 Mo. 537, and the authorities there cited. We do not feel called upon to reexamine these questions now. These corporations are created by charters granted by the Legislature of the State, and their roads should be managed and operated in the manner therein directed, as well as in conformity with the ordinances of the City of St. Louis, so far as the same are not inconsistent or in conflict with the legislative grants. The



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stipulations and conditions upon which they are permitted to use their railways for the transportation of passengers within the limits of the city are fixed by the terms of a general ordinance. See tit. Railways, Rev. Ord. 1861, p. 550. It is provided by the ordinance that "no car shall be drawn at a greater speed than six miles an hour"; and again, "the conductor and driver of each car shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving towards it, and on the first appearance of danger to such vehicles or persons the car shall be stopped in the shortest time and space possible." The law confers upon them no exclusive or peculiar rights and privileges. That portion of the street occupied by the railway is, nevertheless, a public highway, open to the use and enjoyment of all persons. The corporation can only use its track for the running of cars by the procuring a licence from the city, containing the conditions, stipulations, and restrictions, above stated. These go very far towards fixing the measure of its duties and liabilities to the public. In addition to this, it may be said that the peculiar character of the vehicles employed, running as they do through the crowded thoroughfares of the city, makes it incumbent upon every company to exercise the utmost care and diligence to avoid collisions. No other rule could be recognized as compatible with the safety and security of the public. The recognition of this rule, however, does not dispense with the care and prudence required of all persons using the street in common with the railroad company. If therefore, in this instance, the conduct of the deceased directly contributed to the injury by a failure on his part to observe ordinary care and diligence, then there ought to have been no recovery against the defendant.

Our inquiries in this case will be confined to the declarations of law given and refused by the court below, with a view of ascertaining whether the issues were properly submitted to the jury or not.

It was a question of fact for the jury, whether the rate of speed of the car at the time of the occurrence was within the

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limit fixed by the city ordinance or not. Any thing beyond that is to be regarded as excessive and tending to show the negligence of the defendant. The duty of the defendant's servants and agents to keep a vigilant lookout for vehicles and persons on foot, taking into consideration all the attending circumstances, was also a proper question for the consideration of the jury. Taking the instructions all together, and considering them as a whole, we think they were sufficiently warranted by the evidence, and presented the law of the case fairly to the jury.

The other judges concurring, the judgment of the court below will be affirmed.



JOHN MCCARTHY, Respondent, v. THOMAS M. WOLFE, Appellant.

*Bailment—Agistment—Negligence—Practice—Trials.*—A bailee taking cattle to pasture and keep is not an insurer, and is only liable for losses occasioned by his own negligence. Where the petition alleged that cattle bailed to pasture were lost through the carelessness and negligence of the bailee, the burden of proof to show negligence is upon the plaintiff; and if that be not shown, the defendant may ask the court to instruct the jury that the plaintiff is not entitled to recover.

*Appeal from St. Louis Circuit Court.*

R. S. McDonald, M. L. Gray, and F. Garvey, for appellant.

I. The court erred in refusing the 1st instruction asked by the defendant, to-wit, "that upon the proof made the plaintiff could not recover."

Plaintiff alleged the loss of the cattle "through the carelessness, negligence and improper conduct of defendant." Defendant denied this, and thus the burden was on plaintiff to prove that they were lost by default of defendant. Plaintiff did not sue for a non-delivery, but for a loss by the neglect of defendant—4 Eng. Law & Eq. 531, 535-6; 3 East,

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192, 197-8; 8 Ind. 530; 2 Kent, 587; Sto. on Bail. § 410; 7 Humph. 134; 24 Mo. 600.

*Van Wagoner*, for respondent.

FAGG, Judge, delivered the opinion of the court.

This was an action on the part of the respondent to recover of the appellant the value of fifteen head of cattle, alleged to have been lost through his carelessness, negligence, and improper conduct; they were alleged to be worth the sum of five hundred dollars, and constituted a portion of a large lot of cattle which plaintiff had put in charge of the defendant to be fed and taken care of at a stipulated price. It is further averred that eighty-four head of the number in defendant's possession were upon request redelivered to the plaintiff. The following extract from the petition shows substantially the cause of action as set out by the plaintiff after stating the redelivery aforesaid: "But the defendant intending to deceive and defraud the plaintiff in this behalf, did not take due and proper care of the residue, namely, of fifteen of said cattle, or safely or securely keep said fifteen cattle for the said plaintiff; nor did nor would the defendant, when he was so requested as aforesaid, or at any time before or afterwards, redeliver to the plaintiff said fifteen cattle, but, on the contrary thereof, the said defendant so carelessly behaved and conducted himself with respect to said cattle, and took so little and bad care of said cattle, that by and through the carelessness, negligence and improper conduct of the defendant, fifteen of said cattle, of the total value of five hundred dollars, became and were and are wholly lost to said plaintiff," &c. The issue thus tendered by the petition was fully met by the answer, and upon the trial in the St. Louis Circuit Court the plaintiff had judgment for two hundred dollars.

The only question presented by the appeal to this court is as to the refusal of the first instruction asked by the defendant. This instruction is in the nature of a demurrer to the evidence, and was asked at the conclusion of plaintiff's case.

It should be remarked that the defendant in this case did not by his contract assume to become an insurer. He was only bound to observe reasonable care. The measure of his obligation in this behalf is so uniformly stated in all the authorities that it need not be supported by any reference to them. The plaintiff's cause of action was not so stated as to throw the burden upon the defendant of accounting for the loss of the cattle. He did not content himself with a simple averment of the defendant's refusal to redeliver on request, but proceeds to set out the loss and to charge the same as the result of defendant's negligence and improper conduct. The *onus* was upon the plaintiff to show the want of care and diligence which had occasioned the loss. Until that was shown, or at least until evidence had been introduced tending to show it, the defendant could not be called on for his defence. This is such a plain and well recognized principle of practice that it is unnecessary that it should be argued or supported by authority.

The testimony is in a small compass, only two witnesses having been examined, and both on the part of the plaintiff. The first witness was at the time of the loss in the plaintiff's employ, and, as he states, went daily to see how the cattle were fed and taken care of. In his examination in chief, he says: "I can't say whether the fence was good or not; some cattle it would turn, some it would not." But on cross-examination he says: "It was about four or five feet high; it was an open board fence; I considered it a *pretty good fence*." The same witness was taken by the defendant to the yard in which the cattle were fed early on the morning when the loss was discovered. There was a large field adjoining this yard, and after inspecting the premises he makes this statement: "The rails and boards were broken as if cattle had jumped on it or broken it down, and it looked as if cattle had gone through that fence into the large field. The fence of the large field by the road was also broken; it also looked as if the cattle had broken the same down." The witness and the defendant spent several days

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hunting them, but without success. This is all the testimony touching the character of the fence enclosing the premises where the cattle were kept; and except as to the fact of their being well cared for in the way of food, nothing whatever is said about the care and diligence exercised by the defendant.

✓ The mere fact of the loss, without showing affirmatively that the same was the result of a failure on the part of the defendant to exercise the reasonable care and diligence imposed upon him by the nature of his undertaking, could not make him liable. ✓ The plaintiff's own testimony went very far indeed towards exculpating him from all blame in the premises, and we think the instruction was fully warranted by the state of the proof, and ought to have been given.

The other judges concurring, the judgment of the Circuit Court will be reversed and the cause remanded.

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STEPHEN M. EDGELL, Respondent, v. CHARLES L. TUCKER, Interpleader, and THOMAS A. BUCKLAND Garnishee, Appellant.

*Contract—Debt—Assignment—Novation.*—A. being indebted to B. and C. being indebted to A., it was agreed between A., B. and C. that C. should pay B. the amount he owed A., unless upon going to his office he should find that he had been summoned as a garnishee of A. After A. had left, C. requested B. to procure A.'s written order of payment. C. proceeded to his office and found that no process of garnishment had been served, but in half an hour after C. was summoned as garnishee of A., and half an hour after B. presented to C. the written order of A. Upon an interpleader by B. in the garnishment suit—*Held*, that, by the agreement between A., B. and C., C. became indebted to B., and that the debt to A. was discharged, subject only to the condition that the debt had not been attached, and, as the condition had been performed and the debt had not been attached, that the contract between the parties was complete and the liability of C. fixed as the debtor of B.; and that the request of C. that B. should procure A.'s written order, A. not being present did not affect the assignment of the debt, and that the subsequent service of the garnishment could not impair the rights of B.

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*Appeal from St. Louis Circuit Court.**Krum, Decker & Krum*, for appellant.

The third instruction declared that a novation to be good against attaching creditors must be complete, absolute, unconditional, and mutually binding upon all the parties. The idea that a novation cannot be conditional is erroneous. The doctrine of novation was obtained from the civil law. Under the civil law, an engagement could be annulled or diminished by the substitution of a second engagement in its place; this constituted a *novation*—a substitution of a new for an old debt. The old was extinguished for the new debt. This could be accomplished in two ways: First, without a change of the persons, by changing only the value of the obligation; and secondly, by a change of the debtor, and this whether the first obligation subsisted, the second debtor charging himself therewith instead of the former who was discharged, or whether the new debtor made a new obligation—*Heaton v. Angier*, 7 N. H. 397; *Crowfoot v. Gurney*, 9 Bing. 372; *Hyde et al. v. Borreau*, 16 Pet. 169, 180.

In equity, however, an assignment of a chose in action is as good and as valid as the sale of a chattel. In this State, choses in action are assignable and transferable like chattels, the only qualification being that the debtor shall have notice of the assignment; his assent to the assignment is entirely unnecessary, and it is not essential that the transfer should be in writing—*Tibbetts v. George*, 5 Ad. & El. 115; *Ex parte Spruitt*, 3 Swanst. 392; *Boecka v. Nuella*, 28 Mo. 180. It is not necessary that the notice should be by any particular instrument, or in any particular form—*Ashby v. Winston*, 34 Mo. 315; *Burn v. Carvalho*, 4 Myl. & C. § 702.

It is immaterial also that the precise amount of money in Buckland's hands was unknown when he was ordered to pay to the appellant—*Clark v. Mauran*, 3 Paige, 373; *Crowfoot v. Gurney*, 9 Bing. 372.

This being a mere race between creditors, the doctrine *qui prior est tempore, potior est jure*, applies. Tucker had a



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complete equitable title to the funds before the attachment, a title which did not depend upon the assent of Buckland. It is sufficient that Buckland had notice of the transfer, which is not denied. The title of Tucker, by the direction and assignment of Smith & Bullens, was such that he could have maintained an action against Buckland, and would have recovered without having shown the latter's assent—Kimball v. Donald, 20 Mo. 580; Tieman v. Jackson, 5 Pet. 580, 595.

*Glover & Shepley*, and *Currier*, for respondent.

The facts in the case do not show any novation, but, on the contrary, show conclusively that there was no novation, for—

I. in order to be a novation the transaction must be instant—absolute—a present change by which a debt is lifted from the shoulders of one party and placed upon those of the other—1 Pars. on Cont. 217-18; Heaton v. Angier, 7 N. H. 397. Here there was no lifting of the debt; that is admitted on all hands. It was in the beginning connected with the condition imposed, that he (Buckland) would pay Tucker if, when he got to his mill, he did not find he had been garnished. There was no idea in the minds of either of the parties at that time, that there was anything said or done that was *then* in any way operative in any way to change the relation of the parties.

II. In order to be operative it must be upon no contingency—Butterfield v. Hartshorn, 9 N. H. 345.

The idea of novation under our law is that there must be a present accord and satisfaction. If that is not done, there is no consideration for the promise, and the party making it can revoke the promise at his pleasure. There has nothing been done that binds him in any way; it all rests upon a *verbal conditional promise* without consideration. If Buckland had, before he reached his mill, died on the road, then there had been nothing done of any binding obligation upon any one. No authority can be found in any decision at com-

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mon law that a conditional promise can be maintained as a novation. It has sometimes been sustained when there was a present interest transferred, but the amount was uncertain; or, rather, such cases as 9 Bing. 372, and 3 B. & C. 842, have been supposed to hold such a doctrine, though those decisions depend upon different principles.

III. It must have operated to instantly release Smith & Bullens from the debt they owed Tucker—*Caxon v. Chadley*, 3 Barn. & C. 591; *Butterfield v. Hartshorn*, 7 N. H. 345.

Unless at the time Buckland had contracted a new debt of his own while they (the three parties) were together, the transaction is simply an agreement conditional to pay the debt of another, and therefore within the statute of frauds.

There was no equitable assignment of the debt by Smith & Bullens to Tucker; for, 1. It is purely verbal, and unless it is such a transaction as makes it a novation, then there is no assignment, and cannot be, for there is no consideration—*Kimball v. Donald*, 20 Mo. 577, affirmed in *Ford v. Angelrodt*, 37 Mo. 57. 2. There was no release of the debt due by Smith & Bullens to Tucker.

WAGNER, Judge, delivered the opinion of the court.

Stephen M. Edgell sued the firm of Smith & Bullens by attachment, and Buckland was summoned as garnishee. In his answer to interrogatories filed, Buckland admitted that he had in his hands the sum of \$2,102.21, which he owed Smith & Bullens for the purchase of wheat, on the day of the service of the garnishment, but stated that before he received notice of the garnishment the debt was assigned and transferred to Chas. L. Tucker, and that therefore he owed Smith & Bullens nothing. The facts shown upon the trial are, briefly, as follows:

On the 13th day of December, 1864, Buckland and Smith, of the firm of Smith & Bullens, met upon the street in the city of St. Louis, and Smith requested of Buckland a check for the balance for which he was indebted to the firm. The parties not recollecting the precise amount of the indebted-

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ness, the demand was made for \$2,000. At the time Tucker came up, and Smith, at the instance of Tucker, requested Buckland to pay the balance in his hands to him. Buckland told Smith, in the presence of Tucker, he would do so, if, when he got to his office, he did not find a notice of attachment, which would hold the money. Smith then left the party, and Buckland told Tucker that he had better get a written order from Smith & Bullens on him for the money in his hands, as he did not want to pay except on a written order from them. Tucker said he would see them, and the two parted. Buckland proceeded to his office, and on his arrival there he found no legal process had been left, but in about a half an hour the sheriff garnished him as a debtor of Smith & Bullens, and in about one hour thereafter Tucker presented to him a written order of S. & B., requesting him to pay Tucker the amount in his hands due and owing them. It is conceded that Smith & Bullens owed Tucker about \$2,800, a sum considerably in excess of the amount which Buckland was indebted to them. By order of the court, Tucker was brought in to interplead, and the real contest is, whether the attaching creditor or Tucker is entitled to the money which has been permitted to lie in Buckland's possession, awaiting the final determination of a court of competent jurisdiction. The cause was tried before the court without the intervention of a jury, and judgment was given for the plaintiff, the attaching creditor.

It is insisted here for the appellant, that the declarations of law given by the court are erroneous and inconsistent with themselves, and that, for this reason, the judgment should be reversed. But the only question is the true interpretation of the agreement entered into between Smith, Buckland and Tucker, and if this is arrived at, it is decisive of the case, and the instructions need not be noticed. There is no dispute about facts, and the controversy is exclusively one of law. It is strongly urged that when Smith requested Buckland to pay the debt to Tucker, and Buckland assented thereto, although he coupled the assent with the condition

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that if there was no notice of attachment when he reached his office, that this amounted to a novation, and operated to make Buckland the debtor of Tucker instead of Smith & Bullens; whilst on the other hand it is asserted that a novation to be good against subsequent attaching creditors, must be complete, absolute, unconditional and mutually binding on all three parties, and not depend on any condition or contingency. The term novation is borrowed from the civil law, and until a comparatively late period has been little used in our law. It is introducing new parties to a transaction by substitution, as where a debtor is discharged from his liability to his original creditor by contracting a new obligation in favor of a new creditor, by the order of his original creditor. Professor Parsons in his work on contracts gives this illustration: "Thus A. owes B. one thousand dollars; B. owes C. the same sum, and, at the request of B., orders A. to pay that sum, when it shall fall due, to C. To this A. consents, and B. discharges A. from all obligation to him. A. thus contracts a new obligation to C., and his original obligation to B. is at an end"—1 Pars. on Cont. 217. It will be seen here is a new contract formed and a former contract dissolved, and the consideration attaches to the whole transaction. To give full and complete legal efficacy to the new contract, the original liabilities must be wholly extinguished. For unless the former debt is discharged, there is no consideration to support the latter promise, and nothing can spring out of it to maintain an action. Its validity rests upon a present transference of a legal right, by which the debt is entirely extinguished as regards one party and absolutely vested in the third party at his request. To produce this result there must be a mutual concurrence and assent in all the parties at the same time. Buller, J., in *Tatlock v. Harris*, 3 Term, R. 174, puts this case: "Suppose A. owes B. £100, and B. owes C. £100, and the three meet, and it is agreed between them that A. shall pay C. the £100, B.'s debt is extinguished, and C. may recover that sum against A." The case cited from New Hamp-

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shire (*Heaton v. Angier*) is illustrative of the same principle and to the same point. But, will the annexation of a condition to the agreement defeat its validity, though the condition be subsequently performed? Pothier, in his work on Obligations, discusses this question at large, and he says that when there is a failure in the accomplishment of the condition there can be no novation, because there is no original debt to which the new one can be substituted. Also, if the conditional debt, of which it is intended to make a novation, by a new agreement, is a specific thing, which has been destroyed or perishes before the condition is accomplished, there will be no novation even if the condition should exist; for, since the accomplishment of the condition cannot confirm a debt of a thing which has no existence, there is no original debt to which the new one can be substituted. And, on the other hand, if the first debt does not depend on any condition, but the second engagement, intended as a novation, is conditional, the novation can only take effect by the accomplishment of the condition of the new engagement before the debt is extinct. Therefore a novation will be prevented from taking place, not only upon failure of the condition, but also upon the extinction of the original debt before the condition is accomplished. But a term for payment is said to be different from a condition. The debt exists though the term of credit is not expired; therefore, a novation may be made of a debt, payable at a future day, by a pure and simple engagement, or of a pure and simple engagement by another engagement allowing a term of credit; and in either case, the novation takes effect from the first, without waiting for the expiration of the term—See 1 Poth. on Oblig. (by Evans) 382. This principle has been frequently acted upon both in the courts of common law and in chancery.

The agreement between Smith, Buckland and Tucker was complete, only conditioned that if, when Buckland went to his office, he should find legal process there which would hold the money, he should not be required to pay. It is fair to

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presume that Smith & Bullens were in failing circumstances, and Buckland was apprehensive that some action had already been taken which would make him liable. But, if, when he reached his office, this apprehension was not realized, the condition was performed, the engagement took effect, and from that instant he became the debtor of Tucker. The subsequent understanding that a written order should be procured, in nowise altered or affected the contract previously entered into between all three of the parties. Smith was not privy to it, and it was suggested by Buckland, out of abundant caution, as furnishing better and more convenient evidence of the transaction. There is nothing wrong or inequitable in the arrangement. The firm of S. & B. were indebted to both Tucker and the attaching creditor, and while they possessed free and unrestrained control over their own assets they had the right to pay any one of their creditors in preference to another, and if the attaching creditor was behind in point of time, it was his misfortune. This case is not like *Kimball v. Donald*, 20 Mo. 577, and which was followed in *Ford v. Angelrodt*. The only point there, was whether a bill of exchange drawn by a merchant on his factor, though not accepted, amounted to an equitable assignment of the funds. The court held that it did not, and at the very outset of the opinion the judge places it on the ground that it was a bill of exchange, and not a mere order to pay over a particular fund. In law, in order to constitute an assignment of a debt or a novation, so as to enable a transferee to bring an action in his own name, the assent of the debtor to the transfer is essential. In equity the rule has always been different, and no promise by the debtor is necessary to enable the assignee to sue in his own name. The rule in this State, is now fixed upon the doctrine prevailing in courts of equity. As instructive on this question, we will cite two cases having a direct bearing on the subject in controversy, one at common law, the other in chancery. In the case of *Crowfoot v. Gurney*, 9 Bing. 372, one Streather being indebted to Isaac Solly & Sons, addressed a letter to



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Gurney, who was his debtor, requesting Gurney to pay to Solly & Sons whatever balance might be due him. This order was forwarded to Gurney by Solly & Sons, and Gurney consented to pay the debt to them as soon as the amount was ascertained. After the amount was ascertained, but before the money was paid, Streather becomes bankrupt, and his effects all pass into the hands of assignees, who claimed the money. It was held that notwithstanding the bankruptcy of Streather, Solly & Sons might sue and recover of Gurney the amount of the debt; Tindal, C. J., after referring to the facts, says, "these circumstances amount to an equitable assignment of the debt due from Gurney to Streather, for Solly might have gone into a court of equity to compel a formal assignment, and no answer could have been given to such an application." In *Clark v. Mauran*, 3 Paige Ch. 373, Hodges, a merchant, residing at providence, Rhode Island, was indebted to Mauran, who was in business in New York. Upon being applied to by Mauran for payment, Hodges informed him that he ordered the balance of his funds in the West Indies to be forwarded to him, and directed him to place those funds to his credit, on account, when received. The agents of Hodges in the West Indies shipped the funds, consisting of a quantity of doubloons on board of a general ship consigned to Mauran at New York, and forwarded to him a bill of lading, in which bill the doubloons were stated to be for the account and at the risk of Hodges. Previous to the arrival of the ship at New York, Hodges failed and assigned all his property to trustees, for the benefit of certain other creditors, and upon the arrival of the vessel at New York, both Mauran and the assignees claimed the doubloons. On a bill of interpleader filed by the master of the ship, Walworth, Chancellor, held that Mauran had obtained a specific lien upon the doubloons for the payment of his debt, which lien was not affected by the general assignment of Hodges for the benefit of other creditors.

When the agreement or contract was made between the parties, no lien had attached on the money in the hands of

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Buckland, and there was nothing to prohibit Smith & Bul-lens from disposing of it. The only qualification that was annexed to the contract in reference to notice of attachment was destroyed and annulled, when Buckland found, on his arrival at his office, that no such notice was there. From that period, then, the transfer must be considered unconditional and absolute, and the subsequent service of garnishment could not impair the rights of Tucker.

The judgment must be reversed and the cause remanded. The other judges concur.



SAMUEL PELTZ, Respondent, v. HENRY W. LONG, Appellant.

*Contracts—Notes—Rebel Enemy.*—No cause of action can arise out of an illegal consideration. A note given within the rebel lines during the civil war, and founded upon a consideration of goods sold to be paid in Confederate notes, and Confederate notes lent, is founded upon an illegal consideration, and the courts will not permit any action to be sustained therefor.

*Appeal from St. Louis Circuit Court.*

The court at request of respondent gave the following instructions :

1. Although it appear that the plaintiff holds the note in question for collection merely, he is still entitled to bring suit upon the same and recover thereon, provided the payees thereof were so entitled.

2. Although the jury believe from the evidence that a portion of the consideration of the note in question was "pretended paper money called Confederate notes or bonds," and that the same were void in law, and finally became worthless in fact, still the plaintiff is entitled to recover if he believed that the said notes or bonds were actually current at the time defendant so received them, unless the defendant further show that the identical notes or bonds so received by him proved worthless in his hands, or that he was compelled to take them back to whom he had paid them.

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3. The plaintiff is entitled to recover unless the defendant show affirmatively that one or more of the payees of said note did after the 17th day of July, 1862, "engage in, aid or abet the rebellion against the Government of the United States," and did not within sixty days after the proclamation of the President, dated 25th July, 1862, "cease to aid, countenance and abet such rebellion," or that one or more of said payees was at the time of the commencement of this suit resident of or within a State declared to be in insurrection, and of a portion thereof not excepted by proclamation of the President.

*Geo. P. Strong*, for appellant.

The contract which was entered into by defendant with plaintiff when he gave this promissory note for tin ware at its supposed value in Confederate money, and for a loan of Confederate money, was illegal and against public policy inasmuch as it aided in giving value and circulation to these "Confederate notes," which were issued under the authority of armed insurgents, and were used to carry on and support a treasonable conspiracy against the Government of the United States. It was therefore a contract void, as being in contravention of the established interests of society and against public policy—1 Sto. Cont. §§ 545, 546, 569, 587, (n. 2 p. 716,) 608, 610, 615, 624, 461. Contracts against public policy: *Coal Co. v. Norris*, 2 Wall. (U. S.) 45; 1 Pars. Cont. (5th ed.) 456-7, book 1, ch. 1, § 12; *Brown v. Larkington*, 3 Wall. (U. S.) 377; *Brooks v. Martin*, 2 id. 70-9; *Schmidt v. Barker*, 17 Lou. Ann. 261; *Laughlin v. Dean*, 1 Duvall (Ky.) 20; *Armstrong v. Loler*, 11 Wheat. 258.

The authorities thus cited show that any contract which is based upon acts prejudicial to the public interests, in violation of sound morals, or against public policy, cannot be enforced in the courts of the country. Parties to such contracts will be left just where the court finds them.

No contract could be more offensive to public policy or good morals than one which had its foundations in transac-

tions respecting the purchase of goods, sold at prices which by express or implied contract were to be paid in Confederate money.

There must have been another violation of public law, which only appears incidentally in the case. The goods sold were tin ware, and the tin ware must have been imported ; so that this rebel officer was not only dealing in Confederate money, but was also directly or indirectly violating the blockade. But this objection was not essential, as the note in suit is unquestionably tainted with a fatal violation of public duty.

Whoever received this Confederate money had a direct interest in sustaining the rebellion, by the success of which alone the money could have any value. It is matter of public notoriety that the rebellion was sustained for years by the issue and forced circulation of this Confederate money. It was made a legal tender for debts. Every man who dared refuse it was proscribed and driven from the country, or subjected to barbarous treatment while he remained there ; and one of this firm who now asks this court to enforce this tainted contract for his benefit, was actually engaged in compelling the circulation of this treasonable currency. The note was given while he was actually engaged in resisting the attempt of the lawful authorities to enter the city of New Orleans.

Could there be a combination of circumstances which would more clearly justify a court in holding a contract null and void, and turn a plaintiff out of court, than is found in this case ?

*S. S. Boyd*, for respondent.

I. Could the payees and appellant enter into any contract ?

1. Had they been subjects of a foreign power at war with the United States, their right to enter into contract would be unquestioned ; and being citizens of the United States residing in a rebel State, they have the same power to contract, unless there is some express prohibition in the laws of the

United States. The laws passed in regard to commercial intercourse must govern in this case; they only prohibit commercial intercourse, meaning thereby to include all contracts between citizens of an insurrectionary State and a "citizen of other States and other parts of the United States"—Laws U. S. 1861, p. 257, § 5; Proc. in App. V.

2. This does not include intercourse or contracts made with citizens of some State not within the lines of the United States—Laws U. S. 1863-4, p. 376, § 4.

II. Was the contract in question valid?

1. It having been shown that the parties could contract, it follows that the same rules of law are applicable to their contract when made, as would have been had there been no civil war.

2. In determining whether an act is illegal, fraudulent, or against public policy, and thereby rendering a contract void, courts cannot take into consideration the greater or less injury that may result from such act. If it is illegal or fraudulent or against public policy, it matters not how evil may be the consequences, or how little injury may result; the contract is equally void in either case.

3. This contract was not illegal, fraudulent, or against public policy—1 Wall. (U. S.) 73; 3 id. 377; 11 How. 520; 17 Wend. 170; 11 Wheat. 272; 1 Watts & S. 315; 5 Taunt. 182; 13 Mass. 33.

4. Civil war existed in this country after the 13th July, 1861, and the people of the rebel States were all enemies, and owed a qualified allegiance to the State of their domicile, and their persons and property are subject to its laws—2 Black, 635. Consequently, if they contract they must do so according to the laws of their domicile; and if Confederate notes are the only money in circulation, they must base their contracts on these, and pay and receive them in their transactions.

5. There was no failure or want of consideration—37 Mo. 371; 9 Ind. 135; 1 Morris, 312; 5 Fla. 150; 1 N. H. 174;

23 Pick. 283; 2 Hill, 606; Smith on Cont. 87; Add. on Cont. 27; 3 Ind. 39; 8 Yerg. 176.

III. Could the payees bring suit in a loyal State?

1. They lived in New Orleans, which since 1st January, 1863, has been exempted from among the insurrectionary districts, and its inhabitants therefore, saving their liability to be punished for their treason, were on the same footing as any other citizen of the United States in respect to their right to a *status* in the courts of a loyal State—Laws U. S. 1862-3, App. III.; id. 1863-4, App. I.

2. Punishment for treason is well defined, and prior to July 17, 1862, the guilty party, before conviction, had all the rights of other citizens, and among them the right to a standing in court; this is evident from the following: Laws U. S. 1861-2, p. 591, § 6; id. App. IV.

3. The act of July 17, 1862, has no application here, for there is not one tittle of evidence to prove these payees amenable to its provisions. The simple allegation of the facts therein set forth as constituting a bar will not suffice; there must be positive proof of the facts by the party relying upon them as a bar. Even if it be believed that one or more of the payees were in arms prior to 17th July, 1862, no presumption follows that they continued so; but, on the contrary, every legal presumption is in favor of innocence and that they obeyed the law.

WAGNER, Judge, delivered the opinion of the court.

This was an action commenced in the court below on a promissory note made in New Orleans on the 20th of March, 1862, by Long to the firm of Austin, Goodwyn & Co., for the sum of \$2,323.03, and by them assigned to Peltz, the respondent. It is admitted that the note was assigned after maturity and merely for collection, and that Austin, Goodwyn & Co. are the real parties in interest, and no question arises in regard to the rights of the endorsee.

The defence set up is that part of the consideration given



for the note was Confederate money issued by authority of the States lately in rebellion, and that the balance was for articles purchased by Long of Austin, Goodwyn & Co. at a price about three times their value in legal currency, and which were to be paid for in Confederate scrip; and also that the members composing the firm of Austin, Goodwyn & Co. were rebels engaged in resistance to the lawful authority of the Government.

Upon a trial before the court without a jury, judgment was rendered for the respondent.

The evidence abundantly proves that Goodwyn was an officer in the rebel service; that he left the camp and went to New Orleans to make a settlement with Long before the United States forces took possession of that city, and that the note given was the result of the settlement; that he gave to Long five or six hundred dollars in Confederate money, which was included in the note; and that the remainder was for articles sold at Confederate prices, and for which Confederate money was to be received in payment.

That all contracts which are immoral in their nature, or contrary to public policy, or contravene any established interest of society, are void and incapable of enforcement, must be considered as settled propositions of law. It is not necessary that the contract should be expressly illegal; but whenever it is opposed to public policy, or founded on an immoral consideration, no action can spring out of it, the maxim being *ex turpi causa non oritur actio*. In such cases the law will not intervene in behalf of parties who present themselves in the attitude of wrongdoers; it will not listen to their prayers for relief, but will leave them just where their conduct has placed them. Therefore *Ld. Mansfield*, in *Smith v. Bromley*, Doug. 695, says: "If the act is immoral in itself, a violation of the general laws of public policy, then the party paying shall not have his action (to recover back the money); for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*." Chancellor Kent, in *Griswold v. Waddington*,

16 Johns, 486, in one of the ablest opinions that ever emanated from his luminous mind, remarks: "The plaintiff must recover upon his own merits, and if he has none, or if he discloses a case founded upon illegal dealing and founded on an intercourse prohibited by law, he ought not to be heard whatever the demerits of the defendant may be. There is to my mind something monstrous in the proposition that a court of law ought to carry into effect a contract founded upon a breach of law. It is encouraging disobedience and giving to disloyalty its unhallowed fruits. There is no such mischievous doctrine to be deduced from the books." *Ld. Alvanley*, in *Monk v. Abel*, 3 Bos. & P. 35, declares that "the principle to be extracted from the cases on this subject is, that no man can come into a British court of justice to seek the assistance of the law, who founds his claims upon a contravention of the British laws." Such contracts have a tendency to familiarize the mind with fraud, to weaken and destroy the force of just and lawful restraint, and induce a defiance of legal obligations, and ought therefore to be rejected. They are, in the expressive and characteristic language of *Ld. Ch. Justice Wilmot*, contracts "to do that which is injurious to the community; and the reason why the common law says that such contracts are void, is the public good. You shall not stipulate for iniquity."

Obligations arising out of contracts made during the time of the rebellion, and where Confederate money was agreed to be taken, or constituted the consideration passing between the parties, have been on several occasions the subjects of litigation. In the case of *Schmidt v. Barker*, 17 La. Ann. 261, the plaintiff claimed from the defendant, who was a banker in New Orleans, the sum of four hundred dollars, being the balance which he averred was due to him on moneys deposited by him in defendant's bank between the 17th day of January and the 1st day of April, 1862. The amount was claimed to be due in legal tender notes of the United States; but the defendant set up in his defence a special contract, by which it appeared that the deposits were received in his bank

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at the period stated, only on the condition that the amount was to be drawn for in Confederate currency. It appears from the report that the deposits were made by the plaintiff in the same kind of currency. The court held that the transaction was totally illegal and void, that no cause of action would spring out of it, and gave judgment for the defendant.

The case of *Laughlin v. Dean*, 1 Duv. (Ky.) 20, was a suit upon a note. The answer alleged and the defence showed that the consideration for the note was the purchase of Confederate notes. It was decided that the action could not be maintained, and that the policy of the State forbade its courts from aiding either of the parties to a contract for the sale or purchase of Confederate notes.

In a very recent case in Mississippi (*Avera v. Robertson*), Mr. Justice Clayton decided that the issuance of treasury notes by the Congress of the Confederate States was done by virtue of the war power in the constitution, and was the exercise of a belligerent right; that the abolition of the rebel debt by the superior power, the extinction of the government which created it, and the annulment of the laws which gave it vitality, made it impossible to recover on the notes themselves, and that the condemnation adhered to them even in a secondary transaction. Nor is there any force in the suggestion, that although the plaintiff may be debarred from recovering so much as is shown to have been paid in Confederate notes, yet that only goes partially to the consideration, and that the balance is good, and judgment should be rendered for it. This is not the case where the law allows a distinction to be taken where the consideration is illegal in part, and there are separate promises founded on partly legal and partly illegal considerations. It is an entire promise, and if any part of the consideration is illegal, the whole consideration is void; public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise another which is legal—1 Pars. on Cont. (5th ed.) 457.

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In what light can this court, recognizing as it does in the fullest and broadest extent the Constitution of the United States and the laws passed by the Federal Congress as supreme and paramount, view the claims of a party when he comes here and asks indemnity for an act which was calculated and intended to disrupt and dismember the general government and destroy the national fabric. To say that his acts and contracts were against public policy is indeed a very mild characterization. Money was indispensable; it was the very sinew necessary to enable the Confederates to carry on their bloody strife and prosecute their purpose of dissolving the Union, and whoever gave credit to their currency must be adjudged to be a *particeps criminis*. The parties sold their merchandise for Confederate money, thus giving it credit, countenance and circulation; and, in addition, one of them at least was in open and armed rebellion, giving material and physical aid to sustain its character, and ultimately provide for its redemption, as it was made payable after a treaty of separation between the Confederate and the United States. Each part of the transaction adheres to the other and makes the whole entirely void; no relief can be obtained in a court of justice, and the parties must remain where they have placed themselves by their own conduct.

With the concurrence of the other judges, the judgment is reversed.

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CHARLES HATHAWAY, Respondent, v. PETER L. FOY and the PEOPLE'S PASSENGER RAILWAY COMPANY OF ST. LOUIS, Appellants.

*Practice—Action—Equity—Interpleader.*—One of two parties claiming property in the hands of a third party, cannot bring a suit of equity against the other claimant and the holder, to have the rights of the parties determined as upon a bill of interpleader. A bill of interpleader lies only when the party holding the property asserts no interest therein, and is threatened with suits by different persons claiming the same property.

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Hathaway v. Foy et al.

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*Appeal from St. Louis Circuit Court.*

*Ladue and Samuel Simmons*, for appellants.

The court erred in refusing to grant the instruction, which asked the court to declare that the plaintiff having a complete remedy at law against the People's Passenger Railway Company, is not entitled to equitable relief in their action against defendant Foy—*Grandin v. Jones*, 2 Paige Ch. 509; *Wiswell v. Wall*, 3 Paige Ch. 303. Where remedy at law is complete, courts of equity will not assume jurisdiction—1 Sto. Eq. J. § 641; 3 Sanf. 463; *Kortwright v. Buffalo Bk.*, 20 Wend. 91. In this last cited case, it was held that an action of assumpsit lies against a monied corporation for refusing to permit a transfer of its stock upon the books of the corporation—*The King v. Bank of England*, Doug. 523; *Parbury v. Bank of England*, Doug. 529. In the case of the *King v. The Bank of England*, the court refused a mandamus to compel the bank to enter a transfer of stock on its books, on the ground that an action would lie for a complete satisfaction equivalent to a specific relief, and afterwards assumpsit was brought and the cause tried before *Ld. Mansfield*, without any exceptions to the remedy.

In support of the above position the following additional cases are cited:—*Danforth v. Schoharie Tpk. Co.*, 12 Johns. 230; 3 Mass. 381; 10 Mass. 402; 17 Mass. 503; 8 Pick. 98; 7 Cranch, 299; 2 Kent's Com. 289, 29; *Ang. & Ames Corp.* (5 ed.) § 376, § 381; 15 Abb. Prac. (N. Y.) 4; *Ward v. Dewey*, 16 N. Y. 518; *Langston v. Hallowback*, 4 Barb. (S. C.) 9; 5 Johns. Ch. 252; 4 Johns. Ch. 84.

*T. T. Gantt*, for respondent.

I. The Circuit Court had plain jurisdiction of the controversy. It was essentially such a proceeding as might have been compelled by the People's Railway Company, which was liable to be sued by two rival claimants of one hundred shares of stock, and was threatened with suit by the person not holding the certificate. The company could with per-

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fect propriety have filed its bill, praying that these claimants should be made to interplead, and determine their rival claims, before vexing it with an action—2 Sto. Eq. Jur. § 806, and following tit. Interpleader; 1 Spence's Eq. Jur. 659-60. It is not conceived that there can be a necessity for saying more than this.

II. If the proceeding be one which a court of equity would have compelled, it is a waste of time to detain the court by an argument to show that the plaintiff was justified in doing that which a court of equity would have ordered him to do.

III. The parties Hathaway and Foy are then before the court making proof of their respective titles. On the part of Foy, it appears that he made a subscription for the stock, which on the same or the following day he abandoned and surrendered to Hathaway, in consideration that Hathaway would pay the calls made in respect of it by the company; that Hathaway accepted these terms, paid the calls, and received from the company the certificate for the stock. Foy never paid a penny towards these calls, and never made a pretence of a claim to the stock until three years and more afterwards, when it had become manifest that the stock was worth a large premium. Comment seems quite needless.

HOLMES, Judge, delivered the opinion of the court.

The case presents these leading facts: The defendant Foy was an original subscriber for one hundred shares of stock in the People's Railway Company. No certificate of stock had been issued to him. He declined to pay instalments, but no measures were taken to enforce payment or forfeiture. The plaintiff desired to obtain these shares. An agent of the plaintiff states that he went to Foy on his behalf; that Foy said he did not want the shares if he had to pay instalments thereon, and would relinquish them; that he told Foy that the plaintiff would take them, and that Foy assented, and that he had an indistinct recollection that some writing to that effect was given by Foy for the plaintiff, but was not positive. There was no other evidence of



the existence of any written transfer. The plaintiff went to the company, represented to them that he had been substituted in place of Foy as a subscriber for these same one hundred shares of stock, gave them an obligation to save the company harmless, and received a certificate for one hundred shares of stock, on which he paid the instalments that were called for, and received the dividends until Foy notified the company that he still claimed to be the owner of the stock subscribed by him, when the company refused to pay any more dividends to the plaintiff and required him to refund what had been paid, and the money was refunded to await a determination of the controversy.

The plaintiff now brings this suit in the nature of a bill of interpleader against Foy and the company, and prays that the plaintiff may be declared to be the owner of the one hundred shares of stock, that Foy may be divested of all title to it, and that the company may be decreed to pay the dividends to the plaintiff.

It is plain that there is no equity in the petition. This plaintiff cannot maintain a bill of interpleader in such a case. If such a bill could be maintained at all, it could only be done by the company. The ground of jurisdiction in such cases is, that the plaintiff is in the position of a mere stakeholder, claiming no right in the subject matter, but being liable to be vexed by two or more suits, in the names of different persons, going on at some time—2 Sto. Eq. Jur. § 806-7 & § 821; *Freeland v. Wilson*, 18 Mo. 380.

If the plaintiff is entitled to these dividends, he has a remedy at law; and so of the other claimant. If the claim were for the same dividends on the same stock by two different persons, and suits were threatened by both, there might be a case which would entitle the company to maintain a bill of interpleader; but if the case be such that both these parties would be entitled to hold the stock subscribed, or taken by them respectively, there would be no case for an interpleader at the suit of the company, and the whole matter would have to be determined at law.

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As this bill must be dismissed, it is not deemed proper to go further into the merits of the case at this time. We remark only that the evidence produced here to prove a transfer of his stock by the defendant Foy to the plaintiff, or a substitution of the plaintiff in his place, as a subscriber to this same stock, is altogether too indefinite and uncertain to be entirely satisfactory.

Judgment reversed and the petition dismissed. The other judges concur.



ANNE M. PETERS, Administratrix of AUGUSTUS KERR, dec'd,  
Appellant, v. S. N. HOLLIDAY, Administrator of JOHN M.  
WIMER, dec'd, Respondent.

*Administration.—Demands—Judgments.*—Under the provisions of the act of Administration, R. C. 1855, p. 151, art. 4, § 1, judgments which are liens upon the real estate of the deceased are to be paid out of the proceeds of the sales of the lands, if the estate be insolvent, in the order of the judgment liens, without any regard to the order of allowance or classification in the Probate Court. The intention of the act was to secure to the creditor the fruits of his lien, which he was precluded from following by the death of the debtor. The second subdivision of sec. 1, postponing claims not presented in the first year, does not apply to judgments which were liens upon land if the estate be insolvent.

*Appeal from St. Louis Circuit Court.*

This cause was submitted upon the following agreed case :

1. That on 24th May, 1860, John J. Anderson & Co. recovered judgment against John M. Wimer for the sum of \$3,601.34, and that said judgment was assigned to plaintiff's intestate.

2. That said judgment was rendered in the lifetime of said Wimer, and that said Wimer died on the 13th day of January, A. D. 1863.

3. That said Romyn was appointed administrator of said Wimer on the 24th day of March, A. D. 1863, and duly qualified and gave notice of the grant of letters of administration

to him within thirty days after his appointment, as required by statute.

4. That said judgment in favor of John J. Anderson & Co. was not presented to be allowed and classified within one year after the grant of letters to said Romyn; that said judgment was presented within two years after the grant of said letters, and was classified in the sixth class of demands, 10th June, 1864.

5. That in June, 1864, the said Romyn filed a petition in the Probate Court, wherein he stated that from his annual settlement made at that term, and from the abstract of judgments and allowances already made against said estate, and of the claims of which he was notified, there was not sufficient personal property to pay the debts, and asking the court to order a sale of the real estate. This was on the 27th day of June, A. D. 1864, and the petition then filed was accompanied with a statement of all the allowances made against the estate up to that time, as well those upon judgments rendered against said Wimer in his lifetime, as those upon notes and open accounts.

The court ordered said Romyn to give notice of his application to all persons that such application had been made, and that, unless objections were shown before the first day of the September of said court for that year, said order for the sale of the real estate of said Wimer would be made.

At the September term, 1864, said Romyn reported and proved that he had given the designated notice, and that the court ordered him to sell the real estate on the fourth Monday of November following; which order he complied with, having had the necessary appraisement made and notice given. He reported his sale at the December term, 1864, of the Probate Court, and the sale was disapproved by the court; and at the same time a renewed order for sale was made, ordering him to sell on the fourth Monday of February, A. D. 1865, which order was not complied with.

On the — day of December, 1865, he reported to the court that he had not sold as required by the previous order

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of the court, for the reason that the widow of the deceased had taken steps to procure the assignment of the dower in the real estate to be sold, and asked for a renewed order of sale; which was granted, and the real estate ordered to be sold on the fourth Monday of February, A. D. 1866.

The said administrator Romyn sold the above named property in February, 1866, for \$16,105, and made his report to the Probate Court March 10, 1866, when the sale was approved.

6. That the real estate sold by order of the court was situated in St. Louis county, and that the judgment of May 24, 1860, in favor of John J. Anderson & Co., and against said Wimer, was rendered by the St. Louis Court of Common Pleas.

7. That the judgments rendered against said Wimer, and which were a lien upon his real estate at the time of his death, were as follows, and rendered at the following dates, and classified as follows:

| Plaintiffs.  | Amount.   | Date.         | Court.      | Class |
|--|-----------|---------------|-------------|-------|
| Bank of the State of Missouri...                           | \$ 799 00 | Feb. 28, 1860 | Com. Pleas. | 4     |
| John J. Anderson & Co.,<br>assigned to Anne M. Peters..... | 3,601 64  | May 24, 1860  | Com. Pleas. | 6     |
| Bank of the State of Missouri...                           | 859 04    | June 5, 1860  | Com. Pleas. | 4     |
| A. M. Gardner.....   | 1,417 50  | Oct. 1, 1860  | Cir. Court. | 4     |
| Sarah Kitchen.....   | 1,355 25  | Oct. 2, 1860  | Cir. Court. | 4     |
| Bery.....  | 835 12    | Oct. 26, 1860 | Cir. Court. | 4     |
| J. B. Hill.....  | 5,425 88  | Jan. 7, 1861  | Com. Pleas. | 4     |
| John C. Ivory.....   | 1,718 43  | Jan. 12, 1861 | Com. Pleas. | 4     |
| B. M. Runyon.....  | 664 88    | Jan. 12, 1861 | Com. Pleas. | 4     |
| P. R. Kenrick.....   | 324 93    | Jan. 12, 1861 | Com. Pleas. | 4     |
| J. Harrison.....   | 205 54    | Jan. 12, 1861 | Com. Pleas. | 4     |
| W. H. Card.....  | 678 10    | Jan. 14, 1861 | Com. Pleas. | 4     |
| National Insurance Company...                              | 284 51    | Jan. 14, 1861 | Com. Pleas. | 4     |
| Joshua H. Bates.....                                       | 653 35    | Jan. 19, 1861 | Com. Pleas. | 4     |
| C. V. Le Beau.....   | 239 70    | Jan. 19, 1861 | Com. Pleas. | 4     |
| C. V. Le Beau.....   | 860 10    | Jan. 19, 1861 | Com. Pleas. | 4     |
| Charles La France.....                                     | 1,304 00  | Jan. 19, 1861 | Com. Pleas. | 4     |
| J. W. Owens.....   | 350 53    | Jan. 19, 1861 | Com. Pleas. | 4     |
| Clemens Harris.....  | 932 73    | Jan. 19, 1861 | Com. Pleas. | 4     |
| Michigan Mutual Insurance Co..                             | 446 01    | Jan. 21, 1861 | Com. Pleas. | 4     |
| Geo. B. Murray.....  | 880 00    | Jan. 23, 1861 | Com. Pleas. | 4     |
| M. P. Cayce.....   | 1,238 36  | May 19, 1861  | Cir. Court. | 4     |
| S. M. Riley.....   | 1,097 45  | Jan. 7, 1862  | Cir. Court. | 4     |
| Sutter & Cabanné.....                                      | 333 27    | Feb. 15, 1862 | Cir. Court. | 4     |
| J. M. Williams.....  | 180 50    | May 23, 1862  | Cir. Court. | 4     |
| J. B. Brant.....   | 315 78    | Jan. 7, 1863  | Cir. Court. | 4     |

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Only one of the foregoing judgments was rendered prior to the one in favor of Anderson & Co., the payment of which is sought to be enforced.

8. That the said John M. Wimer was before and at the time of his death insolvent; and that his estate is insolvent, and was so insolvent at the time the petition and order of sale were made.

The plaintiff, as the assignee of John J. Anderson & Co., presented to the Probate Court a petition, praying that said judgment be paid by said administrator out of the proceeds of sale of said real estate, in the order of the rendition of said judgments according to date, disregarding its classification in the sixth class and in preference to other judgments rendered against said Wimer in his lifetime at subsequent dates, but duly presented and placed in the fourth class by the St. Louis Probate Court.

*Knox & Smith*, for appellant.

The law that applies to this case is contained in sec. 1, art. 4, of the title Administration, and secs. 11 to 21 inclusive of art. 3 of the same title of the R. C. 1855, and the law in regard to the lien of judgments.

Sec. 10 of art. 3, of the above law, provides how one judgment against the estate of one who dies insolvent shall be paid when it is a lien upon his realty; it provides for the sale of the property, and sec. 12 provides that the proceeds of the sale shall be applied to the payment of such judgment, "and the residue shall become assets in the hands of the administrator, to be administered according to law;" that is, shall be paid on the classified claims which are not upon judgments, in the order in which they are classed.

Sec. 13 of the same article provides that "if such real estate be bound by the lien of the several judgments or attachments, or both, the executor shall state them in his petition for the sale of real estate, giving their dates and amount, and the names of the persons in whose favor they are rendered;" and sec. 14 provides that "the proceeds of the sale of such

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real estate shall be first applied to the payment of such judgments and attachments according to their priority of lien."

It will be perceived by the court that these sections contain specific and full directions as to the manner in which the money arising from the sale of the real estate shall be applied. It is to be paid according to priority of lien. There is no reference to classification. Whether it be in the fourth, fifth, sixth or seventh class, matters not; so that it is a lien upon the real estate, it shall be paid out of the proceeds of the sale of the real estate according to priority, and not according to any classification.

If we turn to the fourth subdivision of sec. 1, art. 4, of the title Administration, R. C. 1855, we find that "judgments rendered against the deceased in his lifetime," and brought in for classification within one year after letters of administration are granted, are to be placed in the fourth class, without regard to whether they are liens or not. They may have been granted in counties different from that in which decedent's real estate is situated; the lien may have expired before his death; yet, if allowed within the year, they are to be placed in the fourth class, and have the benefits of the distribution of assets arising from his personal estate according to order of classification; "but" (this same subdivision goes on) "if such judgments shall be liens upon the real estate of the deceased, and the estate shall be insolvent, such judgments as are liens upon the real estate shall be paid as provided in secs. 11-21 of the 3d article of this act, without reference to classification, except the classes of demands mentioned in the first and second subdivisions of this section, shall have precedence of such judgments"; that is, funeral expenses and expenses of the last sickness shall have precedence. Now what does it mean when it says, "but if such judgments shall be liens upon the real estate of the deceased"? What judgments does it mean by "such judgments"? It means just what the preceding language says, "judgments rendered against the deceased in his lifetime," and not merely these that have been placed in the fourth



class; and when we follow the language of the same subdivision further, and find that the money is to be paid according to the "priority of the lien," as provided in secs. 10-21, we find no limitation to the fourth class, but on the contrary it provides that it shall be paid according to priority of lien, "without reference to classification." Nothing can be plainer than this. Classification shall not enter into it; the law trebles its emphasis on this point.

It first says, in art. 3, that the proceeds of the sale of lands shall be applied to the payment of judgments that are a lien upon that land. It makes this provision independent of classification. Then, in that clause where it provides for the classification of judgments, in order that there shall be no misunderstanding and no clashing of different provisions, it provides that when the judgment is a lien upon real estate, that, so far as the proceeds of real estate are concerned, priority of judgment shall be the rule by which it shall be paid, and to make the emphasis full, perfect, and absolutely certain, it says, "without reference to classification." To this term, "without reference to classification," there is no limit. Were the directions in art. 3 entirely wanting, it would even then not be in doubt; but with the three directions, all in consonance, all making the same provision, one corroborating the other, and accumulating the certainty that it means that no regard shall be paid to classification, but that priority in the time of rendering the judgment shall be the only thing regarded in distributing the proceeds of the sales of real estate.

*Whittelsey, and Glover & Shepley, for respondent.*

The question presented in this case is: In the administration of an estate, shall the judgment creditor who has failed to present his claim for allowance and classification within one year after the grant of letters (due notice being given), and whose claim is therefore placed in the sixth class of demands, because his judgment had priority of lien at the

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death of the decedent, be entitled to payment out of the proceeds of the sale of the real estate, in preference to judgments which were liens, and which were allowed and placed in the fourth class? The question may be more briefly stated: Does the creditor with a judgment lien lose anything by failing to present his demand within one year after letters granted and notice given? Would he lose anything if he never presented his demand at all?

I. To be paid his demand out of the assets, real or personal, the judgment creditor must present his judgment as a demand for allowance against the estate of the deceased to the administrator and the Court of Probate—R. C. 1855, p. 151, chap. 2, art. 4, §§ 1, 2, 5, 9, 13, 18, 27, 29; Bryan v. Mundy's Adm'rs, 14 Mo. 458; Wood et al. v. Ellis' Adm'rs, 12 Mo. 616; Miller v. Janney's Adm'rs, 15 Mo. 265; Nelson v. Russell, 15 Mo. 356; Carondelet v. Des Noyers' Adm'rs, 27 Mo. 36, 39; Miller et al. v. Doan, 19 Mo. 650; Prewitt v. Jewell, 9 Mo. 732.

II. If he fail to do this within three years, the claim is barred—R. C. 1855, p. 151, §§ 1, 3, 7, & §§ 2, 27, & p. 131, § 19, in the same manner as other demands; Montelius et al. v. Sarpy, Adm'r, 11 Mo. 237.

III. If he fail to present his demand within one year, he loses his claim to be paid as a judgment creditor, and takes his place as a general creditor in the sixth or seventh class, in which he exhibits his demand—R. C. 1855, ch. 2, art. 4, §§ 1, 3, 7, & 2, 29. The provisions of art. 4, § 1, s.d. 4, do not alter this rule; the words, "without regard to classification," mean only that the judgments which are liens shall, out of the realty, be paid by priority of lien, instead of *pro rata* with all judgments in fourth class—§ 29.

IV. The plaintiff's demand being placed in the sixth class, can therefore take no part of the assets of any kind until all demands in the previous classes are satisfied, and any lien had was lost by neglect to present the demand within one year—R. C. 1855, p. 157, §§ 29, 27, 28.

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WAGNER, Judge, delivered the opinion of the court.

John J. Anderson & Co. recovered judgment against John M. Wimer for the sum of \$3,601.34, on the 24th of May, 1860, which judgment, subsequent to its rendition, was assigned to plaintiff's intestate; Wimer died on the 13th day of January, 1863, and William J. Romyn was appointed administrator of his estate March 24, 1863, and duly qualified and gave notice of the grant of letters of administration to him within thirty days as required by statute. The appellant's judgment was not exhibited to the Probate Court till the second year of the administration, and was then placed in the sixth class of demands. Several judgments were rendered against Wimer after appellant's judgment; but they were all presented to the Probate Court for allowance within the first year of the administration, and placed in the fourth class of demands. The judgments were all liens on real estate, and Wimer died insolvent. The respondent, as administrator, duly filed his petition asking for an order to sell the real estate belonging to Wimer, which was granted, and the sale was made; the property, however, did not bring an amount sufficient to pay off the judgment debts. The appellant then moved the Probate Court to order the administrator to pay off the judgment demand of her intestate, in preference to the subsequent judgment creditors, regardless of the classifications that had been made; this was sustained by the court, and the order made. The respondent appealed from this order to the Circuit Court, where the judgment of the Probate Court was reversed, and the case is now brought here by appeal.

The controversy here wholly grows out of the conflicting views entertained as to the true construction of the first section of article 4 of the Administration Act, R. C. 1855, p. 151. That section declares that "all demands against the estate of any deceased person shall be divided into the following classes: *First*—Funeral expenses. *Second*—Expenses of the last sickness, wages of servants, and demands for medicine and medical attendance during the last sickness of

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the deceased. *Third*—Debts due the estate. *Fourth*—Judgments rendered against the deceased in his lifetime, and judgments rendered upon attachments levied upon property of the deceased during his lifetime; but if such judgments shall be liens upon the real estate of the deceased, and the estate shall be insolvent, such judgments as are liens upon the real estate shall be paid as provided in the 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th and 21st sections of the third article of this act, without reference to classification, except the classes of demands mentioned in the first and second subdivisions of this section, shall have precedence of such judgments. *Fifth*—All demands, without regard to quality, which shall be legally exhibited against the estate within one year after the granting of the first letters on the estate. *Sixth*—All demands thus exhibited after the end of one year, and within two years after letters granted. *Seventh*—All demands thus exhibited after the expiration of two years, and within three years after the granting of such letters. All demands included in the first, second, third and fourth classes of this section, which shall not be legally exhibited within one year after the granting of the first letters on the estate, shall be classed, as provided by law, according to the time at which they are exhibited.

It is now insisted that because the judgment of the appellant's intestate was not allowed till the second year, and then classified in the sixth class of demands, that all priority was lost, and that it is entitled to none of the distributive share in the assets till the payment of the demands applicable to that class. At first glance there is a seeming incongruity in the section; but, upon a careful inspection, and taking all parts together, the intent, meaning and scope appear sufficiently clear. In general language, it provides that all demands included in the first, second, third and fourth classes, which are not legally exhibited within one year after the granting of the first letters, shall be classed as other demands according to the time at which they were exhibited. The fourth subdivision provides that judgments rendered against

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the deceased in his lifetime shall be placed in the fourth class; and this classification is made without regard to the time when they were rendered, or whether they continued to be liens or not. Judgments being considered of a higher nature than a contract, chose in action, or unliquidated demand, are given a preference; but where the judgment is a lien upon real estate, and the estate of the decedent is insolvent, then the lien is not destroyed so as to put it on an equal footing with other judgments which do not constitute liens, but is to be paid according to the manner pointed out by certain sections in article three of the act relating to administrations, without reference to the time when it was classified.

The intention was to preserve to the judgment creditor the fruits of his lien, which he was precluded from following up and making effective by the death of the debtor. That this is the manifest intention of the statute is evident. All judgments rendered against the deceased in his lifetime are to be put in the fourth class of demands; but express provision is made in case they are liens, and the estate is insolvent, how they shall be paid, without reference to classification. The clause in the seventh subdivision taking away the precedence given to certain classes of demands unless they are duly exhibited in the first year, cannot be made to apply to judgments which were liens, where the estate is insolvent, without entirely ignoring the effect to be given to the special provision providing for their payment without reference to their classification.

The result is, the judgment of the Circuit Court must be reversed, and the judgment of the Probate Court affirmed. The other judges concur.

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SAMUEL GATY, Respondent, v. JOHN C. VOGEL, Appellant.

*Officer—Sheriff—Fees—Executions.*—Under the statute relating to fees, R. C. 1855, p. 768-9, § 13, the sheriff is only entitled to half commissions when he receives the money without making a levy, or when he makes a levy and the money is paid to the sheriff or the party entitled without a sale.

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*Appeal from St. Louis Circuit Court.**Krum, Decker & Krum*, for appellant.

The case made by the pleadings and evidence shows that the amount of the judgment recited in the execution in the hands of the defendant was paid to the attorneys of the party entitled thereto without a levy. In such cases a sheriff is entitled to half commissions on the amount so paid—Sec. 13, R. C. 1855, pp. 768-9. It is not questioned that the defendant is entitled to the commissions claimed by him if he is entitled to any commissions whatever. We insist that the claim of the defendant is within the spirit, if not the letter, of the statute regulating fees.

*Ed. T. Farish*, for respondent.

I. Fees illegally exacted may be recovered back although not paid under a mistake of fact—8 Bos. 148; 3 How. 102; 2 B. & Ald. 562; 2 E. D. Smith, 227; 2 Barn. & C. 729; 4 Cow. 454; 2 N. H. 39; 20 Law & Eq. 319.

II. Section 13, p. 178, R. C. 1865, in force when this execution was in hands of sheriff, and under which his claim for commissions is based, did not entitle the sheriff to commissions; there was no levy or sale, nor was the money paid to the sheriff without a levy. The sheriff did not, under the law, earn any commissions.

WAGNER, Judge, delivered the opinion of the court.

Gaty was the assignee of the judgment and the legal title was vested in him, and it was not material to Vogel who paid the commission provided he was not entitled to it. The execution was ordered to be returned unsatisfied by the judgment creditor, and Vogel, as sheriff, refused to comply with the order unless the costs and commissions were paid; and for the purpose of having the endorsement made on the execution, the commission was paid under protest. The money was not received by Vogel, nor was any levy made under the execution, and he claimed and exacted half the



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statutory commission given where money is collected by the sheriff on execution.

The statute of 1855, under which this action arose, in relation to fees, prescribes the amount the sheriff shall be entitled to for receiving and paying over money, where the same is collected on execution or other process, when property has been levied on, advertised and sold, and gives one half the amount of such commission where the money is paid to the sheriff without a levy, or where the land or goods levied on shall not be sold, and the money is paid to the sheriff or person entitled thereto, his agent or attorney. The sheriff is only entitled to the half commission by the act where he receives the money without making a levy, or where he makes a levy and the money is paid without a sale.

Judgment affirmed. The other judges concur.

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GEORGE FRITSCH, Respondent, v. ALOYS HEISLEN and VALENTINE STOCKE, Appellants.

*Contract—Bills and Notes—Crimes—Sunday.*—A note becomes effectual when delivered to the holder, and although a note be signed upon Sunday, yet, if not delivered until a subsequent day, it will be valid.

*Appeal from St. Louis Circuit Court.*

*Knox & Smith*, for appellants.

The appellants contended that the note was made and the contract of appellants was completed on Sunday, and that the contract is void—R. C. 1855, p.630, § 33 ; 2 Pars. Cont. 262, see note and cases cited.

By the evidence in the case, it appears that the appellants and respondent met on Sunday, the 8th of March, at the house of the appellant Stocke, for the purpose of securing a loan from Fritsch to Heislen ; that the parties then and there agreed upon a loan and the terms of the loan, and then and there executed the note in suit. It matters not

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that the note was not delivered until the following Wednesday ; the business was done, and every thing which Stocke had to do was finished on Sunday, and the contract thus made is void.

*Jecko & Clover*, for respondent.

I. Upon the evidence, the defendants' instructions were rightfully refused.

II. Although the note was dated on Sunday, and although defendant Stocke signed his name on Sunday, yet the note was not delivered until the Wednesday following its date, on which last named day the money was loaned upon said note by the plaintiff to the defendant Heislen, on the security of the defendant Stocke's name ; and, therefore, the contract arising upon the delivery of the note, and the payment of the money, was a valid contract entered into on the Wednesday.

III. The note was valid if the contract was made on Sunday—*Kaufman v. Hamm et al.*, 30 Mo. 387 ; *Bloom v. Richards*, 2 Ohio (Warden), 387.

FAGG, Judge, delivered the opinion of the court.

This suit was determined in the St. Louis Circuit Court, and was instituted upon a promissory note for the sum of three hundred dollars. The note was dated March 8, 1862, and payable twelve months after date, with ten per cent. interest.

The main ground relied upon for a reversal of the judgment in this case is the fact that the note was executed on Sunday and that the contract is therefore void. It appears that these parties met on Sunday, at the house of plaintiff, and concluded an agreement, by which the latter was to loan the defendant Heislen the sum of money mentioned, upon a note which was then executed and signed by Heislen and endorsed by the other defendant, Stocke. The transaction, however, was not completed until the Wednesday following, at which time the note was delivered ; the contract could

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not, therefore, be considered as completed until the delivery took place. All that occurred previous to that time was of no binding force or effect until the money was received and the note delivered. Either party might have refused to carry this agreement into effect at any time previous to the delivery of the note, and the contract must be dated from that time. We consider this to be the real point involved in the case, and do not feel authorized to go beyond it for the purpose of expressing an opinion upon the validity of such a contract when made and fully executed on Sunday.

The other judges concurring, the judgment of the Circuit Court will be affirmed.

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HARRY HORWITZ, Respondent, v. THE EQUITABLE MUTUAL  
INSURANCE COMPANY, Appellant.

*Insurance—Double Insurance—Notice—Estoppel.*—The policy sued on contained a clause providing that if the insured should procure any other insurance, and should not with all reasonable diligence give notice to the company, and have the same endorsed on the policy or otherwise acknowledged in writing, that the policy should cease and be of no further effect. The application for insurance was made for \$10,000; the agent of the defendant stated that by its rules the company could take but \$5,000 on any one risk, and offered to procure the insurance for the remaining \$5,000; which he did the next day, and notified the defendant, which did not object. The premium was subsequently paid and the policy delivered. *Held*, that it was the duty of the company, upon being notified by its own agent of the additional insurance, to endorse the same upon the plaintiff's policy or to notify him of the refusal of the risk, and that, having failed so to do, it was estopped from setting up as a defence the failure to have such additional insurance endorsed upon the policy.

*Appeal from St. Louis Circuit Court.*

*Mason and Voorhis*, for appellant.

I. The policy itself as well as the conditions annexed to it, and as well also the covenants of the application for the policy, make the notification of a subsequent insurance; and the endorsement thereof on the policy, or an otherwise ac-

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knowledge by the defendant in writing, a promissory warranty. These stipulations were therefore a condition precedent to any right of recovery on the policy—*Hutchinson v. Western Ins. Co.*, 21 Mo. 97; *Dietz v. Mound City Mut. Fire & L. Ins. Co.*, 38 Mo. 85; 14 N. Y. 418; 9 Cush. 470; 11 Cush. 265; 12 Cush. 144; 6 Gray, 189.

Had the plaintiff informed the officers of the defendant that he had acquired the subsequent insurance, but failed to present his policy for the endorsement of the same thereon, or have the acknowledgment of consent thereto in writing, the defendant would not be estopped to plead the defence set up in this case. The endorsement upon the policy, or the acknowledgment of the defendant in writing otherwise, was a condition precedent without which the plaintiff could not recover—*Carpenter v. The Prov. Ins. Co.*, 16 Pet. 512; *Barrett v. Union Mut. F. Ins. Co.*, 7 Cush. 178; 1 Phil. on Ins. 477; also cases cited above.

*Sharp & Broadhead*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action brought to recover the sum of five thousand dollars insurance on a policy, executed and delivered by the defendant to the plaintiff, covering a certain stock of foreign and domestic liquors. The policy contained this clause: "If the said insured or assigns shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this company, and have the same endorsed on this instrument or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect." The defence relied upon was, that, after the issuance of the policy by the company, the insured procured further insurance without notifying the company of the fact or having it endorsed upon the policy.

The facts, as they appear from the record, are, that one Berg, who was the agent for the defendant, went to the plaintiff's office, and the plaintiff informed him that he wanted

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insurance for \$10,000 on his stock of liquors. Berg told plaintiff that his company never took more than \$5,000 on any stock of goods, but that he would get the other \$5,000 in some other company. Plaintiff then signed the application which was made out by the agent Berg, and the premium was agreed upon for the whole \$10,000 if he should effect the other insurance. Berg then took the application and handed it in at the office of the company, and informing the company at the same time that he had agreed to get \$5,000 more, as the plaintiff wanted \$10,000. To this it does not appear that the company made any objection, but accepted the risk, issued the policy, and received the premium. The next day, in compliance with his agreement, Berg effected the additional \$5,000 insurance in the Western Insurance Company, and told the president and secretary of the defendant that he had succeeded in getting the remaining insurance for the plaintiff. The policy issued by the defendant was delivered to plaintiff in an envelope, which he never opened till after the loss occurred by fire, and no endorsement of approval was ever made on it by the defendant.

The defendant asked the court to declare the law to be, that, under the evidence in the case, "it was the duty of the plaintiff, upon the procurement of additional insurance, to have so informed the defendant, with a view of giving actual notice thereof and of obtaining its consent thereto by writing, by endorsement upon the policy, without which the plaintiff cannot recover." The court gave the declaration, but appended the following addition: "But if defendant was notified that its own agent was procuring the additional insurance of \$5,000 for plaintiff, and that after it was obtained said agent notified the defendant of the fact, then it was the duty of the defendant to endorse such additional insurance on the plaintiff's policy, or to notify plaintiff of its refusal to do so; and until such refusal was notified, the defendant is estopped from setting up as a defence that such additional insurance was not endorsed on its policy."—The judgment was for the plaintiff.

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Where the terms of a policy provide that it shall be void in case of any other insurance not mentioned in or endorsed upon the policy, or in case of any subsequent insurance without notice to the insurer and endorsed upon the policy, or the notice acknowledged in writing, such stipulations have uniformly been held as conditions precedent to any right of recovery on the policy—*Hutchinson v. Western Ins. Co.*, 21 Mo. 97; *Deitz v. Mound City Mut. F. & L. Ins. Co.*, 38 Mo. 85. But it is not questioned that the conditions may be waived by the company, and such waiver may be made as well by acts as by positive declarations. The company may also be estopped under certain circumstances where, by a course of dealing, or its open actions, it has induced the insured to pursue a policy to his detriment. Now, what were the terms of the contract? Why that the plaintiff wanted \$10,000 insurance on his stock, and that defendant's agent agreed to procure it for him. This agreement was notified to the company and no objection was made; its own rules or custom forbade it taking more than \$5,000, but it was the common practice, in negotiating for policies, for the agent to get what was wanted above that amount in other companies. The company knew that the agreement made by its own agent was for \$10,000, and it also knew that he had obtained the additional \$5,000; the whole matter formed one continuous transaction, and while a mere verbal notice given by a party other than the insured would not be a sufficient compliance with the conditions, yet here it entered into the contract so palpably, with the implied assent and acquiescence of the company, that to hold it not bound would be sanctioning the most manifest injustice. By the express agreement, of which the company was entirely cognizant, the insured was lulled into security, having an abiding confidence that his contract would be carried out in good faith. It is very true that a written contract should not be altered, varied, or impaired, by parol evidence; but this rule only applies where the writing constitutes the mutual agreement of the parties. When the policy was issued, the company was apprised of



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the agreement that its agent had made; and when the agent secured the further insurance, carrying out the whole contract, it did not repudiate the transaction, or offer to cancel the policy. Under the circumstances, if it did not intend to be bound, it was its duty to speak and act.

This case differs essentially from those cited in the books, where the only questions were as to the validity of the notice. The defendant received the premium with a full knowledge of all the facts, and it ought not to be permitted to gainsay its acts when it will have the effect of defrauding the other contracting party.

Let the judgment be affirmed. The other judges concur.



WILLIAM MORRISON, Appellant, v. ELIAS C. HANCOCK and  
THE SOUTHERN HOTEL COMPANY, Respondents.

1. *Mechanics' Lien—Contractor—Owner—Furnishing Materials—Evidence.*—In an action under the Mechanic's Lien Law, to enforce a lien for materials furnished to the contractor with the owner of the building, it is not necessary for the plaintiff to show that the materials furnished were actually used in the construction of the building; it is sufficient that (in the absence of collusion and fraud) the materials were furnished for the purpose of being used in the building. The statements of the contractor are admissible in evidence to show the purposes for which the materials were purchased.
2. *Mechanic's Lien—Agent—Contractor.*—The contractor with the owner for the erection of the building, under the Mechanic's Lien Law, is so far the agent of the owner that he can bind the property by all contracts for materials and labor necessary to complete the building.

*Appeal from St. Louis Circuit Court.*

*Garesché & Mead*, for appellant.

I. The receipts or tickets are evidence, and should not have been excluded. Whenever the act of the agent is admissible, his declarations, at the time, are evidence as part of the *res gestæ*—1 Greenl. Ev. § 113; *Gamble v. Johnson*, 9 Mo. 616; *Marr v. Hill*, 10 Mo. 323; *Pool v. Bridges*, 4 Pick. 378; *Odd Fellows' Hall v. Musser*, 24 Penn. 510; *Crowther v. Gibson*, 19 Mo. 365.

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II. The court had no right verbally to instruct the jury—*Prac. at Law*, 1268, § 47, *R. C.* 1855; *Mattison v. State*, 6 Mo. 402; *Bichler v. Coonce*, 9 Mo. 347, 350.

III. The plaintiff, in the absence of any fraud or collusion, and upon the proof that he had first notified the hotel company before he delivered the lumber, was entitled to recover—*Wallace v. Melchoir*, 2 *Browne*, 104; 2 *Sergt. & R.* 172. And where a similar delivery of materials was proven—*Greenway v. Turner*, 4 *Md.* 305; *White v. Miller*, 18 *Penn.* 54. Such laws are constitutional; they deprive no one of his property, but on the contrary secure to every one what is justly due to him, giving each one priority of right according to the claims of natural justice—*Dubois Adm'r v. Wilson*, 21 Mo. 214.

*Whittlesey*, for respondents.

This was a suit to recover judgment against Hancock & Stannard as contractors, and to enforce a mechanic's lien against the Southern Hotel. Hancock made default; Stannard was not served; the hotel company answered, denying all the allegations of the petition. The plaintiff dismissed the suit as to Stannard.

At the trial plaintiff proved the sale of the lumber sued for and its delivery at the mill of H. & S., but entirely failed to prove that it was used in the construction of the defendant's building so as to create a lien. To supply this defect, plaintiff inquired of witnesses as to what Hancock, the defendant, had said as to the purposes for which the lumber was intended, to be used. To this the hotel company objected upon the ground that H. was not its agent so as to bind the company, and that its property was subject to a lien, not by contract, but from the fact that the materials were used in the building. The court sustained the objection and plaintiff excepted.

The court put the issue to the jury to decide whether the materials were used in the hotel, and instructing them that Hancock's statements could not affect the hotel company.

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The jury found that the materials were not used in the hotel. Judgment refusing to enforce the lien.

As the plaintiff was only a sub-contractor, his right to a lien depended upon his compliance with the statute, showing that the materials were furnished and used in the construction of the hotel building—Sess. Acts 1856-7, p. 668 § 1; *Hause v. Carroll*, 37 Mo. 578; *Hause v. Thompson et al.*, 36 Mo. 450. As the contractors were not agents for the owners of the building, they could not bind the company by mere contract; not being agents, their statements constituted no part of the *res gestæ*. Hancock not being agent for the company, his statements as to the purposes for which he purchased the lumber were mere hearsay as to the company, and could not affect the company in any way, it being shown that the lumber was not delivered at the building, but at a different place, and there being no evidence that it was used in the building.

FAGG, Judge, delivered the opinion of the court.

The giving of improper instructions, and the exclusion of competent evidence offered on the part of the appellant, constituted the errors chiefly complained of in this case.

This was a proceeding in the St. Louis Circuit Court to enforce a lien against the Southern Hotel, in the city of St. Louis, for lumber furnished for the building of the same. The defendants, Hancock & Stannard, were alleged to be the contractors for the building, and the parties at whose instance the materials were furnished.

The suit was dismissed as to Stannard, and upon the trial the jury found for the plaintiff only as against the other defendant, Hancock, and judgment was rendered accordingly. The only answer in the case was a separate one on the part of the hotel company. No appearance was entered for either of the other defendants.

It is shown by the bill of exceptions that, at the conclusion of the testimony on the part of the plaintiff, the court was asked to declare that there was no legal evidence to au-

thorize the plaintiff's recovery. This was refused, but accompanied by a verbal statement on the part of the judge, which is said to be erroneous, as tending to influence the jury in their estimate of the evidence. The remark that he did not feel authorized to do so under the law as laid down by this court, was not sufficient to warrant any inference on the part of the jurors prejudicial to plaintiff's case. The instructions given, as well as the exclusion of the testimony offered by plaintiff, explains the theory upon which the case was tried.

The first section of the act, under which this suit was brought, is as follows: "Section 1. That every mechanic, artisan, workman, or other person doing or performing any work upon, or *furnishing any materials for buildings, &c.*, shall have a lien upon the same, &c., whether he or they be employed by the owner, agent, contractor, sub-contractor, or other person, each for his own work done and materials furnished."—Sess. Acts 1857, p. 668.

The plaintiff offered to show, by persons in his employ at the time the bill of lumber was furnished, the declarations of Hancock & Stannard, as to the purposes for which they had made the purchase. This was excluded by the court, and the jury afterwards instructed that they were to ascertain whether this particular lumber was actually used in the building of the hotel or not, and the statements made by these contractors must be excluded from their consideration in determining this question. Such a construction of this statute would, in our judgment, defeat the very ends for which it was made, and make it a snare to entrap the unwary mechanics and material men, instead of affording them the protection which the law intended.

It is admitted by the pleadings that Hancock & Stannard were the contractors for the carpenter work in this building. It is to be inferred from this fact that the kind of lumber purchased from the plaintiff was necessary in carrying out their contract with the company. There is enough in this transaction to show that the credit was given, not to the con-

tractors, but to the building then in course of construction. Under the provisions of the special law authorizing this proceeding, these contractors, for certain purposes and to a certain extent, are to be treated as the agents of the company, with authority to bind it to the extent of the material necessary to complete their contract. All that the plaintiff is required to show, is the fact that the materials were furnished for the purpose of being used in constructing the building. It would be altogether unreasonable to require him to follow those materials from his lumber yard to the building, and to make positive proof of the fact that they were actually used for the purposes for which they were alleged to have been purchased. Such a thing is not only a matter of extreme inconvenience in all cases, but in a majority of instances must be totally impracticable. In contemplation of law the owner of the building, by employing a person to do the work, does thereby clothe him with authority, not to bind him individually and to an unlimited extent, as an ordinary agent might do, but so far as the procuring of materials and labor may be necessary to complete his contract. He can make no contract that would confer a personal obligation upon his principal, but upon the building itself, wherever the steps pointed out by the law, and necessary to create this obligation, are properly taken.

This view of the case, of course, excludes the idea of any fraud or collusion between the material man and the contractor. Nothing of that sort is pretended here. There is nothing to show that the amount of the lumber or its character was sufficient to raise a presumption on the part of the plaintiff, that it could not have been really the intention of the contractors to apply it to the purposes indicated by their contract. It is not objected that the proper steps were not taken by the plaintiff to secure his lien, and the whole case rests simply upon the point, whether it would be required of him to make out his case without being permitted to show what the contract between the contractors and himself was after excluding their statement, and also that these materials

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were actually used in the construction of the building. We think that the court erred upon both of these points. No injury can be done to the company by such a construction of this statute. It requires that the party, who seeks to avail himself of the benefit of the lien provided for, shall give due notice of an intention to file the necessary account at least ten days beforehand. This was done. The suit was commenced within the period of four months as required. It was in the power of the company to protect itself against any loss on account of the plaintiff's demand, by withholding so much from these contractors in their settlements, until the question of its liability to the plaintiff was settled. The construction thus given to this statute can work no injury to the defendant, and is absolutely necessary to the protection of the plaintiff.

The other judges concurring, the judgment of the court below will be reversed and the cause remanded for further trial.

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STATE OF MISSOURI to use of ALEXANDER L. TYLER, Plaintiff  
in Error, v. L. CHARLES BOISLINIERE, WILLIAM M. MCPETERS, and M. L. LINTON, Defendants in Error.

*Practice—Parties—Replevin—Bond—Officer—Sheriff.*—When the coroner in executing an order for the delivery of personal property fails to take a good and sufficient bond from the plaintiff in the action, the officer and his securities will be liable upon the official bond to the party injured by such neglect; and where the property is taken from the sheriff who had levied upon the same, the plaintiff in the execution has such an interest in the property that he may maintain the action.

*Error to St. Louis Circuit Court.*

*Hill & Jewett*, for plaintiff in error.

*Krum & Decker* and *Cline & Jamison*, for defendants in error.

WAGNER, Judge, delivered the opinion of the court.

This was an action on the official bond of the defendant,



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as coroner of St. Louis county. Plaintiff, in his petition, alleged that he caused a writ of attachment to be issued out of the Circuit Court against the property of one Christian Schaeffler and directed to Michael S. Cerré, then the acting sheriff of St. Louis county, for the recovery of the amount of a note which the said Christian owed to the plaintiff; that under said writ of attachment said Michael S. Cerré, as sheriff, levied upon and seized certain goods and chattels more than sufficient in value to satisfy the debt; that afterwards a third party, Lorenz Schaeffler, caused a suit to be brought in the St. Louis Court of Common Pleas against said Cerré, claiming said property under the "Act relating to the claim and delivery of personal property," and procured from said court an order upon Cerré for the delivery of the property to the defendant, and that the defendant, as coroner, took the property under the order of the said court and delivered the same to the plaintiff in that suit, Lorenz Schaeffler. It is then assigned as a breach of the bond that the defendant, as coroner, failed in executing the order of delivery, in the suit of Lorenz Schaeffler v. Michael S. Cerré, to take from said Schaeffler a bond with two or more securities. It is further alleged that afterwards, on the motion of Cerré, the suit of Lorenz Schaeffler v. Michael S. Cerré was dismissed, the said Lorenz having failed to file a new replevin bond as ordered by the court, and thereupon the Court of Common Pleas made an order upon the defendant, as coroner, to retake the property and deliver it to the said Cerré, defendant in the suit; but that the said coroner, although requested, neglected and refused to retake the property or deliver it to Cerré. Plaintiff further alleges that afterwards he recovered judgment against Christian Schaeffler, and that the said Christian is wholly irresponsible and insolvent, and that the judgment cannot be collected from him, and that by reason of the premises under the statute an action has accrued in his favor against the defendant and his securities on his official bond.

A demurrer was filed to the petition, and the grounds as-

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signed for causes of objections were: 1. That there was a defect of parties; that the relator was not a proper party to the action, as he had no special or general interest in the goods taken, and therefore could not have suffered damage within the meaning of the statute. 2. That the petition did not state facts sufficient to constitute a cause of action, because it did not appear that plaintiff had any property in the goods, or that Cerré had assigned or transferred to him his right of action. 3. That it did not appear that the defendant could have executed the order of the court to retake the property, and there was no breach of the bond. This demurrer the court sustained, and afterwards gave judgment for the defendants.

It is preposterous to say here that there was no breach of the bond. The statute provides that the officer shall not receive or take the property until the plaintiff shall deliver to him a bond executed by two or more sufficient securities. It is confessed that the statute was not complied with, and the act of taking an invalid and insufficient bond constituted a breach. Nor is there anything in the statute, in a case like this, requiring the assignment or transfer of the bond taken by the officer, to enable the party interested to sue. Section 20 of the act (R. C. 1855, p. 1246) provides that after the due execution of any bond taken in virtue of that article, the parties to the action shall be barred of any right of action against the sheriff or other officer for the seizure and delivery of the property; that is, where the officer has done his whole duty, and taken a good and sufficient bond under the statute. But the 22d section says that if the sheriff, or other officer, fail to take or return a bond as required by law, or if the bond taken is adjudged insufficient, he and his securities shall be liable to the party injured for all damages by him sustained, to be recovered by civil action, or by civil action on the officer's bond.

Who else but the plaintiff was injured by the officer's neglect to perform his duty? It was not the sheriff from whom the property was replevied. He had a special property,

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but so far as his loss was concerned it was *damnum absque injuria*. We see no merit in the objection, that the suit can only be prosecuted in the name of the sheriff from whom the property was wrested. Suppose this sheriff refuses to sue, or is dead, or has absconded, is the party deprived of all remedy, when the statute declares that any person who is injured may maintain the action? The plaintiff had sufficient property attached to secure satisfaction of his indebtedness, which has been entirely lost to him by the official misconduct and negligence of the defendant; and the statute gives him a remedy, and there is no legal pretext on which the defendant can escape responsibility.

Reversed and remanded. The other judges concur.

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JOHN B. BLAKE, Respondent, v. THE CITY OF ST. LOUIS,  
Appellant.

*Action — Municipal Corporations — Negligence — Highways.*—Municipal corporations are bound to keep the streets and highways in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel, and if they neglect so to do they will be liable for all injuries happening by reason of their negligence; and they cannot avoid this responsibility by arrangements with other parties.

*Appeal from St. Louis Circuit Court.*

A. W. Alexander, for appellant.

Sharp & Broadhead, and J. B. Goff, for respondent.

The city could not surrender her jurisdiction over her streets so as to relieve herself of liability caused by their bad condition—Wallace v. Mayor of N. Y., 2 Hilton, 440; Mayor of New York v. Bailey, 2 Denio, 433-45; Mayor of N. Y. v. Freuze, 3 Hill, 612, and references; Wendell v. Mayor of N. Y., 39 Barb. 329; Nelson v. Vt. & C. R.R. Co., 26 Vt. 717.

The city was bound to keep her streets, and all the appurtenances thereto, in order and in safe condition for passen-

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gers, and failing to do so, was liable for damages resulting from such failure; she has supreme power and exclusive jurisdiction over such streets, and the corresponding duty of exercising reasonable care over them is a necessary concomitant of such jurisdiction—Wallace v. Mayor of N. York, 2 Hilton, 440; Browning v. City of Springfield, 17 Ills. 143; Hutten v. Mayor of N. York, 5 Seld. 163; Mayor & Ald. of Memphis v. Sasser, 9 Humph. 757; Mayor of N. Y. v. Freuze, 3 Hill, 612; Mayor of N. Y. v. Bailey, 2 Denio, 433; Boston v. City of Syracuse, 37 Barb. 292; Wendell v. Mayor of N. Y., 39 Barb. 329; Weightman v. City of Washington, 1 Black (U. S.) 39; Nebraska City v. Campbell, 2 id. 590; Lloyd v. Mayor of N. Y., 1 Seld. 369; Storrs v. City of Utica, 17 N. Y. 104.

WAGNER, Judge, delivered the opinion of the court.

This was a suit brought in the court below by Blake against the City of St. Louis to recover damages in consequence of an injury which he received by falling into an inlet or aperture on Fourth street. The aperture was left in an exposed condition, and Blake, passing along in the nighttime, fell in, and was severely injured in the spine, so as to render him a cripple for life. He obtained a verdict and judgment in the Circuit Court, and the city has appealed the case.

Several exceptions were taken at the trial to the admission and exclusion of evidence, and the giving and refusing of instructions; but they seem to have been all abandoned here, except the action of the court in overruling a motion to suppress the deposition of one Lewis.

There can be no doubt of the liability of the city; the charter vests in it the power "to open, alter, abolish, widen, extend, establish, grade, pave, or otherwise improve, clean and keep in repair streets," &c., at the public expense. It has general and exclusive jurisdiction over the streets, and, for the purpose of repairing, opening and improving the same, it is authorized to levy a tax within the corporate lim-

its. Municipal corporations are bound to keep the streets and highways in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel, and if they neglect to do this they will be held liable for all injuries happening by reason of their negligence.

Evidence was offered on the part of the city for the purpose of showing that, at the time the accident happened, it was the duty of a company having charge of the Southern Market to keep that portion of the street in repair where the injury occurred; this evidence was excluded by the court. We see no error in the ruling of the court in this regard. It was incumbent on the city to keep the streets in reasonably safe and good travelling condition, and with a view to this object it was vested with extensive supervising and controlling authority, and it could not avoid its responsibility by an arrangement with another party.

A motion was made and filed by the counsel for the city to suppress the deposition of Lewis, because the commission for taking the same was granted contrary to law. The motion was not called up for argument or determination, and the objection to its being read was not taken till after the jury was sworn, and the court then overruled the objection and permitted it to be read in evidence. The counsel for the respondent has cited to us a rule of the Circuit Court to sustain its action on this point, but the rule is not copied in the bill of exceptions, nor has it been furnished to us, and we cannot take judicial notice of the rules of the inferior courts, nor will we undertake to go through the respective clerks' offices in search of rules to suit the convenience or supply the negligence of counsel. The application for and the granting of the commission were both irregular, but had the deposition been suppressed it could have made no difference in the result of the cause.

The evidence was at best only cumulative, and the verdict is well sustained without it. The instructions presented correct declarations of law, and the case was well tried.

The judgment is affirmed. The other judges concur.

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HORACE METCALF and NIMROD SNYDER, Respondents, v.  
CHARLES T. LARNED and PHILOMENA his wife *et als.*, Appellants.

1. *Equity—Notice—Lis pendens.*—A suit pending is not notice to a purchaser so as to affect and bind his interest until the writ is served after petition filed.
2. *Administration—Heirs—Assets.*—Where heirs are proceeded against on account of a debt of the ancestor, they are not liable *in solido*, but only *pro rata* on account of assets descended. An estate by descent renders the heir liable for the debts of the ancestor to the value of the property descended, and he holds the land subject to the payment of the ancestor's debts.

*Appeal from St. Louis Circuit Court.*

C. Gibson, for appellants.

Does the plaintiff, who is but the representative of the administrator, enjoy any greater advantages than the administrator himself? The administrator did not claim the proceeds of the sale in partition. His sale of the land, if valid for any purpose, passed the title to the land. It certainly merged the debt and all pecuniary claim of Mrs. Tyler. Her conveyance to the plaintiff was her receipt for money to be claimed of the defendants in this suit. If her conveyance was good, and the theory of the plaintiff's case be law, then, although an heir sells in partition only his title, he would be bound to pay off all the debts of the estate; for if the land was ever sold, he would be bound to refund all the money received by him, with interest. The injustice of such a principle is manifest.

The rule *caveat emptor* applies to all sales in partition; the parties selling are not "responsible for the title" either in law or equity—*Owsley v. Smith*, 14 Mo. 155; *Swartz v. Dryden*, 25 Mo. 572. Equity will not interfere to restrain the collection of the purchase money on the ground of failure of the title—*Ib.* *A fortiori*, it will not order the money to be refunded, with interest, many years after payment.



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*R. M. Field* and *C. H. C. Chapin*, for respondents.

I. The defendants, as heirs of Thomas F. Smith, Sen., having assets by descent, were liable for his debts; in other words, the debts of their father became their own, and they were liable to suit by the creditors after the personal estate of the father was exhausted—Bac. Abr. tit. Heir, F., —; 2 Spence's Eq. 388; 4 Kent's Com. 419 et seq.; 2 Tuck. Com. 107 et seq.

The expeditious remedy given by statute to the creditor to obtain a sale of the land under the order of the Probate Court, has in general taken the place in practice of a suit against the heir; but the latter remedy remains, and is generally resorted to after the close of the administration, as being in such case more expeditious and direct—*Miller v. Woodward*, 8 Mo. 169; *Dobyns v. McGovern*, 15 Mo. 662; *Schermerhorn v. Barnhardt*, 7 Paige, 354; S. C. 9 id. 28; *Piatt v. St. Clair*, 6 Ham, 227; *Hilden v. Morent*, 2 J. J. Marsh, 187; *Ticknor v. Harris*, 14 N. H. 272; *Elwood v. Diefenderf*, 5 Barb. 398; *Dodge v. Manning*, 11 Paige, 347; *Morris v. Monat*, 2 Paige, 590.

II. The proceeds of the sale in the partition between the defendants were chargeable with the debts of Thomas F. Smith, and if they had remained in court would have been applied directly to satisfy the claims of creditors—*Langham v. Darby*, 13 Mo. 653; *Van Wezel v. Wyckoff*, 3 Sandf. Ch. 528.

III. The plaintiffs having been compelled, for the protection of their own interests, to pay the debt of the defendants, are entitled to be reimbursed by the latter; and besides they are entitled in equity to be subrogated to every right of the creditor whose debt they have paid—*Deering v. Winchelsea*, 11 Wh. & Tud. Lea. Cas. 78, and notes; *Miller v. Woodward*, *ubi supra*; *McCormick v. Irwin*, 35 Pa. 111.

And the same principle applies to the case where the creditor has a lien on two funds, and he resorts to the one in which another is interested; that other is entitled to be sub-

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rogated to the rights of the creditor in the other fund—1 Sto. Eq. § 559. And the principle has been applied to a case where a person holding under a defective title pays off encumbrances upon the estate, the real owner will not be allowed to recover the estate without repaying the amount of the encumbrances—Bright v. Boyd, 1 Sto. 478; Vallé v. Fleming, 29 Mo. 182.

IV. Nor is there any evidence that the purchasers had notice of the existence of unpaid debts against the estate. It sufficiently appears that at the time of the sale both the plaintiff and defendants were ignorant of the existence of such debts. And in respect to Metcalf, the principal purchaser, it was distinctly proven by the counsel who examined the title for him that no such notice was had by him. There was no *lis pendens* that would affect the plaintiffs with notice, for in fact there was no writ served in the suit by Chambers' administrator before the sale in partition, and no person is affected with notice of a *lis pendens* until process served—Murray v. Ballou, 1 Johns. Ch. 576.

WAGNER, Judge, delivered the opinion of the court.

In the year 1843 Thomas F. Smith died seized of a tract of land containing 640 acres, lying and being situate in the county of St. Louis; his estate was duly administered on, and the settlement of the administrator in March, 1857, showed a balance in his hands of personal effects amounting to \$817.52. In the year 1852 the defendants in this suit, who are heirs at law of Thomas F. Smith, united in a petition for partition of the land, and commissioners were appointed by the court, who reported that the land was not susceptible of division without prejudice; whereupon the court ordered the same to be sold by the sheriff. The tract, for the purpose of sale, was divided in several parcels, a portion of which the plaintiffs purchased when sold in partition. Previous to the sale Metcalf, who was a non-resident, employed an attorney to examine the records to see whether there were any encumbrances or debts owing by the deceased

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which would affect the title to the land. After diligent search in the Probate Court the attorney found none, and so represented, and upon the faith of that representation Metcalf made the purchase.

In September, 1853, Sturgeon, administrator of Chambers, commenced an action for breach of covenant against Beckwith, the first administrator of Smith, upon the covenants of a deed executed by Smith in 1843, laying the breach as occurring in 1848, five years after Smith's death. The writ was returnable to the October term, 1853, of the St. Louis Land Court. There was no service on Beckwith, and the case was continued until the March term, 1854. Beckwith died in December, 1853, and C. C. Whittelsey succeeded him in the administration. At the March term of the court, 1854, and after the sale in partition, Whittelsey entered his appearance voluntarily.

Judgment was obtained in the suit of Chambers' Adm'r v. Smith's Adm'r, and there being a deficiency of assets, the land sold in partition was on the petition of Whittelsey, the administrator, sold to satisfy the judgment. In the sale under execution Mrs. Tyler, the owner of the judgment, bought the property, and subsequently the plaintiffs paid her the amount of the judgment debt and received from her quitclaim deeds for the premises.

This suit was instituted against the defendant as the heir of Smith, who had received distributive shares from the estate arising from the sale in partition, to reclaim the amount paid by plaintiffs in protecting and completing their title.

The first point raised, that the institution of the suit of Chambers v. Smith was sufficient to constitute notice of subsisting encumbrances to purchasers or bidders at the sale in partition, we think is not maintainable. The papers were previously filed, but there was no service of the writ, or appearance by the party, until after the sale had taken place; and the established rule seems to be, that a *lis pendens* is not notice to a purchaser so as to affect and bind his interest by the judgment till the service of the writ after the petition.

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is filed—Murray v. Ballou, 1 Johns. Ch. 566; Fenwick v. Gill, 38 Mo. 525.

The court refused, on the application of the plaintiffs, to declare that the defendants were liable *in solido*; and in this we think it was correct, for where heirs are proceeded against on account of assets which they have received from their ancestor, they are chargeable only distributively and *pro rata*. —2 Tuck. Com. 111.

An estate by descent renders the heir liable for the debts of his ancestor to the value of the property descended, and he holds the land subject to the payment of the ancestor's debts—4 Kent's Com. (6 ed.) 419; Watkins v. Holman, 16 Pet. 25. The heirs cannot alien the land to the prejudice of creditors, and they have no right to the real estate of their ancestors, except that of possession, until the creditors are paid. But it is insisted for the defendants, that the plaintiffs bought the property in a partition sale, and that in a statutory proceeding for partition there is no warranty—Owsley v. Smith, 14 Mo. 153; Schwartz v. Dryden, 25 Mo. 572. Admit this principle, and the only question to be determined is whether it applies to this case.

In Langham v. Darby, 13 Mo. 553, the heirs of Langham joined others in a suit for partition of certain lands; an order of sale was made; after sale, but before the sheriff made his report, the administrator applied to the court for an order that the proceeds of the sale going to the heirs should be paid over to him for the benefit of Langham's creditors; the court, being satisfied that the estate was insolvent, made the order. This court approved the proceeding and said that justice was accomplished by it. The case of Van Wezel v. Wyckoff, 3 Sandf. Ch. 428, decides that a creditor of the ancestor who is entitled to maintain a suit against heirs in respect of the real estate descended to them, may have a decree against the proceeds of such real estate when the same have been paid into court upon a sale of the property under an order or decree of the court.

Under the law, the heirs of Smith must give way to cred-

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itors. The debts must first be satisfied before they can claim or derive any benefit from the estate of their ancestor. The money that they got arising out of the sale in partition was the money of the creditors so long as any debts or liabilities remained unpaid. The plaintiffs who, after diligent search and without notice, purchased in good faith, were compelled to pay their money to satisfy an encumbrance for which the heirs were liable, and they ought not to be turned away remediless. The heirs had received and obtained possession of the plaintiffs' money, which should have been appropriated to the payment of the judgment debt, and we are unable to distinguish any difference in principle where the money is thus paid over and sought to be recovered back, and where a specific decree is rendered against it when it has been paid into court.

Judgment affirmed. Judge Fagg concurs; Judge Holmes, having been of counsel, not sitting.



GEORGE REINHARDT, ALBERT REINHARDT, JOHAN OTTO REINHARDT, and CAROLINE REINHARDT, by HENRY WILKE, their Guardian, Appellants, v. MARTIN WENDECK, ROBERT A. BAKEWELL, and FERDINAND PROVENCHERE, Respondents.

*Practice—Parties—Partition.*—In a suit for partition of land, the trustee and *cestui que trust* in a deed conveying a part of the premises are properly made parties for the purpose of binding their interest although no relief be prayed against them.—*Alexander v. Warrance*, 17 Mo. 228, commented upon and explained.

*Appeal from St. Louis Circuit Court.*

*Bakewell & Farish*, for appellants.

I. The demurrer was sustained in the court below on the doctrine of *Hill v. Martin*, 28 Mo. 78.

II. The defendants' possession is not adverse, but is only in right of his curtesy—*Blakely v. Calder*, 13 How. 477.

III. Tenancy by the curtesy is a life estate and similar to

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dower in its character ; and under § 1, R. C. 1865, p. 617, partition is authorized.

*J. A. Beal*, for respondents.

There is a misjoinder of actions and of parties. The suit seeks to divide a tract of land among the heirs of George Reinhardt, and also asks the court to ascertain the interest of Martin Wendeck in the property as tenant by curtesy, and to apply the interest of Martin Wendeck to the payment of a deed of trust in favor of Provenchere. This is jointly two separate causes of action. In the first place, it seeks to adjust the title of the heirs of George Reinhardt to the tract of land which is a cause of action between the heirs. In the second place, the petition seeks to adjust and settle the rights of Martin Wendeck as a debtor, in a deed of trust given by him and his wife on the property. There is not the least connection between the action for partition and the action for marshalling of assets and payment of the debts of Wendeck and wife. In the third place, the partition seeks to compel Provenchere to release his right to sell the land under the deed of trust, and resort to the part of the funds that the sale of Wendeck's curtesy might bring in a partition sale. This would have the effect of destroying the security and lien of Provenchere on the fee simple of the real estate and accept a less estate. This cause of action is separate from the others, and, not growing out of the same transaction, cannot be joined ; therefore the petition is multifarious in joining separate and distinct causes of action in nowise connected, and cannot be done, according to the repeated decisions of this court—25 Mo. 357 ; 26 Mo. 186.

The test is whether one judgment in favor of one plaintiff against one defendant can be rendered. In this case there would require separate judgments in favor of plaintiff against one defendant, and one judgment in favor of one defendant against another defendant—11 Mo. 267 ; 9 Mo. 273 ; 17 Mo. 228 ; 26 Mo. 72.

By the statement of petition, Wendeck is a tenant by



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curtesy of the lands sought to be sold, and of course he has a right to the possession of the property under the curtesy, and has a legal estate. The plaintiffs have no right to immediate possession; their right is in abeyance, and to come into enjoyment after the death of Wendeck. It would divest Wendeck of the legal estate and possession to sell the property and divide the money; the curtesy would be valueless. This court has decided that a tenant by curtesy has a legal estate, and that heirs cannot sue him by partition—*Alexander v. Warrance*, 17 Mo. 228.

In partition suits parties must show a legal title as contradistinguished from an equitable one—7 Mo. 356, 6.

WAGNER, Judge, delivered the opinion of the court.

This was a suit for partition, and asking for a sale of the premises on the ground that they were not susceptible of division without prejudice to the parties.

The petition alleged that Wendeck was tenant by the curtesy of four-fifths of the real estate, and that during his marriage he and his deceased wife executed a deed of trust on the same, by which they conveyed their interest in the property to Bakewell as trustee to secure the payment of certain notes, described in the said deed, to Provenchere. The trustee and *cestui que trust* were both made parties, but no judgment was asked against them. There was an allegation that the money for which the notes were given was received by Wendeck and appropriated to himself, and a prayer that that such portion of the proceeds of sale as might be assigned and set off to Wendeck, as for his interest as tenant by the curtesy, might be applied so far as the same would extend to the payment of the notes. The court sustained a demurrer to the petition.

The statute makes provision for the partition of lands where they are held in joint tenancy, tenancy in common or coparcenary, including also estates in fee, for life or for years, tenancy by the curtesy and in dower; and it is required that every person having any interest in such prem-

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ises, whether in possession or otherwise, shall be made a party to the petition. The trustee and *cestui que trust* were made parties because they had a direct interest in the premises and for the purpose of binding their interest; no affirmative relief was asked for or against them. Making them parties was not a misjoinder.

It is presumed that the demurrer was decided on misapprehension of the points ruled in *Alexander v. Warrance*, 17 Mo. 228, which is the principal case relied on in support of the judgment of the court below. But it appears from that case that the object of the suit was to obtain partition among the heirs of Catharine Warrance, and it was not alleged in the petition that Warrance, the defendant, had any interest in the premises; indeed the theory of the plaintiffs was that he had not. He was, however, in possession as tenant by the curtesy; and the pleaders, in addition to the count for partition, joined a count to eject him from the possession, thus confusing an action for partition and an action in ejectment. The court held that there was a misjoinder of parties, and that the petition was multifarious.

The plaintiffs were entitled to a trial on the merits as presented in their petition, and the judgment will be reversed and the cause remanded. The other judges concur.



CITY OF ST. LOUIS, Appellant, v. WIGGINS FERRY COMPANY,  
Respondent.

1. *Revenue—Corporations, Foreign—Residence.*—A corporation is a resident subject or citizen of the State in which it is created, regardless of the residence of its members or stockholders; but although the corporation itself cannot migrate or go out of the State creating it, it may by its agents act beyond the bounds of the State in which it exists, and thus become liable in other States to service of process upon its agents, and its property locally situate in such States may be subjected to taxation.
2. *Revenue—Residence—Personal Property—Assessment.*—The personal property of a resident actually situated beyond the limits of this State, is without its jurisdiction, and cannot be assessed for taxation in this State; but the prop-

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erty of a non-resident is taxable here if it be found situate within the local jurisdiction, whether in the hands of the owner or his agents.

3. *Revenue — Corporations, Municipal and Foreign — Boats and Vessels.* — Ferry boats owned by a corporation created by the laws of the State of Illinois, and running between the Illinois and Missouri shores, are subject to taxation in this State, and by municipal corporations, if the companies owning said boats have an office for the transaction of business in this State within the limits of such city or town. For the purposes of taxation, such foreign corporation having an office and doing business within this State is to be considered a resident.

*Appeal from St. Louis Circuit Court.*

C. C. Simmons, for appellant.

The City of St. Louis has authority under its charter to levy and collect, within the city, taxes not exceeding one per centum upon all property made taxable by law for State purposes. Shares of stock and all other interests held in steamboats, keel boats, wharf boats, and all other vessels, are made taxable by law for State purposes—Sess. Acts 1860–61, p. 62.

The defendant, not being a corporation created by the laws of this State, is to be regarded as a non-resident, and its property in the possession of, or managed, regulated and controlled by its agents, residents of this State, is liable to taxation here—*International Life Ass. Soc. v. Comm'rs of Taxes*, 28 Barb. 318; *Hoyt v. Comm'rs of Taxes*, 9 E. D. Smith, 224.

I. The boats used by the defendant are liable, and ought to be taxed by the State and municipal authorities of this State.

1. Because they are registered at the port of St. Louis, which thus becomes their home port and renders them liable to be taxed there—*Hays v. Pacific Mail Steamship Co.*, 17 How. 596; *City of New Albany v. Meekin*, 3 Ind. 481; *Wilkey v. City of Pekin*, 19 Ills. 160. 2. Because the company pays taxes in Illinois, it is not for that reason exempt from liability to be taxed in this State also—*Catlin v. Hall*, 21 Vt. 152.

II. The boats belonging to the defendant are subject to taxation under our laws, because all the officers of the com-

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pany are residents of this State, and its stock is also mostly owned here. In everything but in name and that which is merely imaginary the defendant is a home company, and ought so to be considered. It has a superintendent and other employees residing in Illinois; it holds real and personal property, has an office, and transacts business, there; but the actual control and management of its affairs, and the real possession of all its property, is in fact and in law vested in the president, directors and other officers of the company, who are its trustees and agents, and who are all citizens of this State and reside in the city of St. Louis.

*E. B. Ewing*, for respondent.

I. Upon the facts admitted, the property in controversy is not taxable by the city. The city has authority to impose a tax on such property only as is made "taxable by the laws of the State within the limits of the city"—Ordinances 1866, p. 570. Two things must concur: first, the property must be subject to taxation by the law of the State; and second, such property must have its actual *situs* within the limits of the city. It is evident the intention of the ordinance was to confine its power of taxation to property actually within the territorial jurisdiction of the city; its terms are too plain to admit of doubt. And that the property was not within the limits of the city in any sense, the facts agreed make most manifest; and that the city never so regarded it, appears further from an ordinance, then and still in force, prohibiting the ferry boats from remaining on this side the river longer than ten minutes—Ordinances 1866, p. 394, § 12, see also § 17; *Wilkey v. City of Pekin*, 19 Ills. 161.

II. The law of the State, however, under which this assessment was made, gives no authority, nor by any fair construction of its terms does it attempt to subject the stock or property of a foreign corporation to taxation. This law classifies the objects of taxation as they relate to corporations, first, by a provision applying evidently to home corporations in general, making taxable their shares of stock and

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all property owned by them over and above their capital stock—Acts Adj. Sess. 1863, pp. 65-7, § 1. It also provides that all incomes derived from public stocks, bank stocks, stocks of chartered companies, or other property, real or personal, that are not taxed in this State, shall pay a tax, &c.—p. 66, § 1.

There is here a manifest distinction between home and foreign corporations, subjecting the stock, &c., of the former to taxation, and the incomes derived from the stock and property of the latter ; such is the obvious construction of the section, and the reasonable interpretation of its language. It is only intended, however, to maintain on this point that the Legislature did not go further than this ; but it is not conceded that it could go even this far in subjecting property beyond the territorial jurisdiction to taxation.

Section 5, p. 67, says that " all property situated in any other State or Territory, and belonging to any resident of this State, which is personal by the laws of such State, shall be assessed in the county of such resident. This, of course, does not include stocks or other property of foreign corporations, the incomes of which alone the Legislature intended to make taxable ; for if it were intended thereby to include stock, &c., of foreign corporations, it would be inconsistent with the clause in regard to incomes derived from stock and property of such corporations.

If, then, the property in controversy is not embraced by the terms of the ordinance as being actually within the limits of the city, the claim of authority to subject it to taxation can only be supported, if at all, by a legal fiction, by which it is transferred from a foreign jurisdiction so as to subject it to the operation of our own laws.

The State has no power to impose a tax upon property whose actual *situs* is within a foreign jurisdiction. This would seem to result obviously from the familiar principle that the laws of one country have no intrinsic force except within the territorial limits and jurisdiction of that country or State—a principle resulting from the equality and independence of

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States and an essential attribute of sovereignty, of which the taxing power is an incident. The question, however, in a variety of forms has been the subject of adjudication, and the decisions in various States, which are cited below, establish, or rather recognize, these general principles: that all subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, on the soundest principles, exempt from taxation—9 E. D. Smith, (N. Y.) 226 et seq.; Hoyt v. Comm'rs of Taxes, 9 id. (N. Y.) 236; Sto. Const. Law, § 550; Catlin v. Hall, 21 Vt. 152; Finley v. City of Philad., 32 Pa. 381; City of New Albany v. Meekin, 3 Porter, (Ind.) 482; Sangamon & Morgan R.R. Co. v. Morgan Co., 14 Ills. 166; Wills v. Collector, 26 Ills. 300; Johnson v. City of Lexington, 14 B. Mon. 648; McGregor v. McGregor Br. State Bk., 12 Iowa, 79, 529; Commonw. v. Hamilton Manuf'g Co., 12 Allen, not yet reported, referred to in Amer. Law Reg. for May, p. 437, holding that corporations are taxable for their stock in the State, city or town where they are situated, although its stockholders are non-residents.

The fact that the boats are registered in St. Louis is of no importance in the case at bar, where the other facts, admitted so clearly, fix the *situs* or locality of the property in a foreign jurisdiction. The place of registration is a fact which is necessarily indeterminate as it respects locality of property for the purposes of taxation. The act of Congress requires ships and vessels to be registered by the collector of the district, in which shall be comprehended the port to which such ship or vessel shall belong at the time of her registry, which port shall be deemed to be that at, or nearest to which, the owner, if there be but one, or, if more than one, the husband or acting and managing owner of such vessel usually resides—1 Stat. 288, § 3.

The port or place of registration is manifestly of no consequence in determining the *situs* of a vessel for the purposes of taxation. If this circumstance could fix the locality of the property, all the ferry boats in the State that are regis-



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tered in the State would be liable to a tax here; or a boat plying between places within the State of Illinois, and wholly within its jurisdiction, would, on the same principle, be taxable in St. Louis, if this were the port nearest to which the owner (although a citizen of Illinois) resided.

All the property of the company within the city pays a tax, and it pays to the city \$2,000 every six months upon a ferry licence—Ordinances 1866, p. 395.

HOLMES, Judge, delivered the opinion of the court.

The cause was submitted to the court below upon an agreed state of facts. Judgment was given for the defendant, and the plaintiff brings the case up by appeal.

The substantial question is, whether the ferry boats of this company plying between the city and the Illinois shore, across the river, are subject to taxation here for city purposes as personal property situated within the city limits.

The company was chartered by the Legislature of Illinois, and had a principal office in this city, where the president and other chief officers, including the treasurer, reside, and also another office and place of business on the opposite shore in Illinois, where the superintendent, engineers and other minor officers and agents reside, and where the warehouses, machine shops, and some other property of the company were located, and where the boats were laid up when not in actual use. The wharf boat, permanently located at the city wharf, was admitted to be subject to taxation here. The property was assessed, the tax bills made out, and the suit brought, according to existing laws and ordinances, against the corporation by name as the owner of the boats; and service was had upon the president and secretary in accordance with the statute of this State—R. C. 1855, p. 376, §§ 1-4. These statutes provide that any corporation may be sued by name, by summons to be served on the president or other chief officer, personally, or by leaving a copy at any business office of the company, in the county where the cause of action accrued or in any county "where such corporation

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shall have, or usually keeps an office or agent for the transaction of their usual and customary business;" and that any corporation incorporated in another State, and having property in this State, shall be liable to be sued and their property subjected to attachment in the same manner as individuals, residents of other States. These provisions are broad enough to include all corporations, domestic or foreign.

It has been held by this court that a foreign corporation which had located its chief office or place of business within this State, was no longer to be regarded as wholly a foreign corporation, but might be sued like any other individual resident here, by service on the president or other chief officer at such place of business, and was, therefore, not liable to the process of attachment as a non-resident of this State—*Farnsworth v. Terre Haute & Alton R.R. Co.*, 29 Mo. 75.

It was said that a foreign corporation which takes up its residence and establishes a principal office here, becomes amenable to the laws and the process of the State like an individual resident, and "affords all the facilities for serving the ordinary process of law which any corporation with a charter derived from the Legislature of this State could do."

A corporation is a resident subject or citizen of the State in which it is created, wherever its members or shareholders may reside; and though it must be constituted of some place within the dominion of the government which creates it, and can have no legal existence beyond the boundaries of that State, must dwell in the place of its creation, and cannot migrate to another State; yet it may act by agents beyond those bounds where it exists—*Ang. Corp.* §§ 103-109; *Louisville Railw. Co. v. Letson*, 2 How. (U. S.) 497; *Blackstone Manuf. Co. v. Inhabitants*, 13 Gray, 488. There can be no doubt that, within the limits of the State which grants the charter, a corporation may have a special constructive residence in more places than one, so as to be charged with taxes and dues and be subjected to the local jurisdiction where its officers and agencies are actually pres-

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sent in the exercise of its franchises and in carrying on its business; and the legal residence of a corporation is not necessarily confined to the locality of its principal office or place of business. It depends on the official exhibition of legal and local existence, and its place of residence may be wherever its corporate business is done—*Glaize v. South Carolina Railw. Co.*, 1 Strob. 70; *Cranwell v. Ins. Co.*, 2 Rich. 512; *Ang. Corp.* § 107. This doctrine is, in general, confined to the territorial limits of the State from which the corporation derives its charter; but however it might be on general principles only, there can be little doubt that the effect of the statutes of this State is such as to make this corporation, though chartered abroad, a resident of this State, not only for the purposes of suing and being sued, by ordinary process, or by attachment, but for all the purposes of ownership of personal property and of taxation, if the same be actually situated within the city limits.

It is of no consequence, therefore, that this corporation had an office and place of business on both sides of the river and in different States, for it may very well have several such offices. In the case of *Croft v. Brooklyn Ferry Co.*, 36 Barb. 201, the company was chartered by the laws of New York, and had offices for the transaction of business both in New York and Brooklyn; and it was held that the certificate of incorporation (as required by statute), and the acts of the company in the exercise of its franchises, showed where the corporation was established; that its franchises extended to both places; that it was established in both, and that it was subject to the jurisdiction of either.

The personal property of a non-resident actually situated in another State is not to be assessed and taxed against him in this State, but the property of either a resident or a non-resident is taxable here, if it be found situate within the local jurisdiction, whether it be in the hands of the owner himself or of his agents—*Hoyt v. Comm'rs of Taxes*, 23 N. Y. 224; *International Life Ins. Co. v. Comm'rs of Taxes*, 28 Barb.

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318; City of St. Joseph v. Hannibal & St. Joseph R.R. Co. 39 Mo. 476.

But it is contended that these boats belong to a foreign corporation resident in Illinois, having its principal office and place of business in East St. Louis; that the boats plied from the Illinois shore to the city of St. Louis, where they were allowed to stay only long enough to receive and discharge freight and passengers, and was usually laid up on the other side when not running, and that therefore the actual *situs* of the property was in Illinois, where only it could be subjected to taxation.

It appears from the agreed statement of facts that the boats were duly registered at the port of St. Louis, under the laws of the United States. Whether ordinary ferry boats are such vessels as are entitled or required by the laws of the United States to be registered and licensed as vessels employed in the coasting trade or otherwise, might admit of some doubt. The acts of Congress providing for the better security of the lives of passengers on board steamboats, have been held to apply to all steamers navigating the waters of the United States, whether within a State or between States—Waring v. Clark, 5 How. (U. S.) 465.

On the facts stated, we may take it for granted that these boats were such vessels as were required to be registered. By these laws the registration is to be made at the port nearest to the place where the owner resides, or where the acting and managing owner usually resides, and the name of the vessel and port must be painted on the stern; and it has been decided that these things indicate the domicile or home port of the vessel, and that this home port where the individual owners are resident is the place where the property is subject to local taxes—Hays v. Pacific Steamship Co., 17 How. (U. S.) 598.

It made no difference in that case that the vessels had been engaged in the transportation of passengers between different places in California and Oregon, as well as from

New York to San Francisco; and it was said that the nature of the business, or the mode of transacting it, did not affect the question of the *situs* of the property in view of the right of taxation by a State.

The case seems to suppose that the owners were resident at the home port. In the case of *Hoyt v. Comm'rs of Taxes*, 23 N. Y. 224, a distinction was made between ships and other personal property, and it was said that ships "registered at a port within the State, and having consequently no *situs* elsewhere, were justly taxable to the resident owners." In *Wilkey v. City of Pekin*, 19 Ills. 160, it was held that the city had no power to tax the property even of residents if its actual *situs* were without their limits, and it was said that "the place or *situs* of a vessel must of necessity be the place of registration, and the port from and to which it regularly departs and returns." The share of an owner resident in New Albany in a vessel registered at Louisville, and which only touched occasionally at New Albany, was held not to be taxable at the latter place—*City of Albany v. Meekin*, 3 Ind. 481. In reference to taxation, personal property does not necessarily follow the domicil of the owner, nor does its liability to taxation depend upon his residence merely, but rather upon the local situation—the *situs*—of the property—*Finley v. City of Philadelphia*, 32 Penn. 381. The property is subject to taxation in consideration of the protection which it receives from the laws of the place where it is found, and where the owner or his agent is resident. It is taxable where it is permanently located; and where the principal officers of the corporation resided out of the State by whose laws it was created, the place of residence for purposes of taxation within that State for movable property was held to be where the principal office was located, there being no such office in the county where it was found—*Mills v. Thornton*, 26 Ills. 300; *Sangamon & Morgan R.R. Co. v. County of Morgan*, 14 Ills. 163. These cases concerned ordinary kinds of personal property, where there was nothing else to determine its situation with reference to taxation; but the

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other cases cited may be taken as decisive authority for the position that a registered boat or vessel is taxable only in the home port where the owner or his acting manager or agent is resident.

The facts stated show that the city of St. Louis was the domicil and home port of these ferry boats; that the owner, though a corporation created in another State, had a principal office and place of business in this city, and was a resident here within the meaning of our law; that the chief officers of the company resided here, and were the acting managers for the owner, and that the boats plied from and to their home port, and were subject to the immediate control of the officers and agents residing here. That the boats, when not in use, were laid up on the opposite shore, or that the harbor regulations did not permit them to lie at the city wharf longer at a time than was necessary for receiving and discharging freight and passengers, or that the company also had an office and place of business in Illinois, or that two-thirds of the stock was owned in this city and in other States than Illinois, are all immaterial circumstances. The property is not assessed to the stockholders, but to the corporation by name. It makes no difference where the shareholders reside—*Queen v. Arnaud*, 9 *Adolph & Ellis*, 806; *Ang. Corp.* § 109. The corporation is taxed as owner, and in respect of the boats as specific personal chattels, and not at all in respect of the stock or income. The personal property of the company which is permanently located, or actually situated in Illinois, is no doubt taxable there only; but these registered boats must be held to be taxable here only. It does not necessarily follow from this that all boats and vessels that may be registered at this port must be liable to taxation here. If a ferry boat were plying across the Illinois river from and to the place of the owner's residence, and never can within the limits of this city, and were registered here only because this was the port of entry nearest to the owner's place of residence, we suppose the property would be taxable there where it was so permanently situated and



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used. It was so held by this court in the case of the City of St. Joseph v. Hannibal & St. Joseph R.R. Co., Feb. term, 1867, where the steamers, though registered at St. Louis as the nearest port, were employed in running from St. Joseph to various points on the Missouri, and at which place the owners, or their agents in charge of the property, resided and had their business office. In this case we think it is sufficiently established by the facts that the city of St. Louis is not only the port of registration nearest to the residence of the owner, but is to all intents and purposes the domicile or home port of these boats, where the owner, though a foreign corporation, is constructively resident, where the agents of the owner in whose hands and control the property is, are actual residents, and where the property may be deemed to be locally situate. We conclude, therefore, that it was liable to this taxation for city purposes.

Judgment reversed, and the cause remanded. The other judges concur.

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JOHN C. POTTER, Jr., *et als.*, Appellants, v. A. J. L. STEVENS,  
Garnishee of JOHN McDOWELL, Respondent.

*Attachment—Garnishment—Fraudulent Conveyances.*—A party summoned as a garnishee, upon an allegation that he had executed his promissory notes to the defendant in the attachment suit, and that he had combined with said defendant in an attempt to defraud his creditors, cannot protect himself by showing that he had subsequently paid said notes to an assignee who was also a participant in the fraudulent acts of the defendant in the attachment. (See *ante* Potter v. Stevens, 229, and Potter v. McDowell, 31 Mo. 62.) To protect himself, the garnishee should have filed his bill requiring the holder of the notes and the plaintiff to interplead.

*Appeal from St Louis Circuit Court.*

On the 7th of April, 1858, plaintiffs instituted a suit by attachment against John McDowell, in which the said Stevens was summoned as garnishee on the 10th day of April, 1858. In his answer, filed October 11, 1858, Stevens admits that on the 31st day of March, 1858, he executed five prom-

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issory notes, each for \$5,000, payable to the order of said McDowell one, two, three, four and five years after date, and two notes of same date, each for \$4,450, one payable two years and the other three years after date; that all of these notes were delivered to John McDowell at the time they were executed, and he has not seen them since. On the 26th day of September, 1864, Stevens filed his amended answer, alleging that he had been enjoined, and believes that before he was garnished said John McDowell had assigned two notes of \$4,450 each to George McDowell, and that said garnishee duly paid said notes at maturity, as he was bound to do. The other notes prior to their maturity, he is informed, were assigned to various parties named in said answer. In the answer it is further alleged that the fee simple title to this property, for which the \$5,000 notes were given, was never conveyed to said Stevens, and that there is no valid or valuable consideration for the said five notes.

Plaintiffs filed their denial of the answer of said Stevens.

Instructions given for defendant :

1. If the court, sitting as a jury, find that previous to the said defendant Stevens being summoned as a garnishee in this suit, the notes on which it is attempted to hold him as maker had been delivered to the said John McDowell, and by the said McDowell (before maturity and previous to said garnishment) endorsed over and delivered to George McDowell, there was at the time of said garnishment no indebtedness from Stevens to said John W. McDowell upon which he can be held liable to plaintiff in this suit.

2. The allegations of the garnishee in this case in his answer must be taken as true, unless proved to be untrue by the evidence offered by the plaintiff.

Plaintiffs' instructions refused:

1. If the jury believe from the evidence that the notes of A. J. L. Stevens which were transferred by John McDowell to George McDowell were so transferred for the purpose of

hindering or delaying the creditors of the said John, or the creditors of J. & W. McDowell & Co., they will find for the plaintiffs for the amount of said notes.

2. The fact, that George McDowell became a partner in the firm of J. & W. McDowell & Co. in 1856, and that he put no money into said business, raises the presumption that J. & W. McDowell were not indebted to George McDowell at the formation of said copartnership.

3. If the firm of J. & W. McDowell & Co. and each and all the members of said firm were insolvent or unable to pay their debts on the 31st of March, 1858, neither of the parties could legally transfer to the other partner any negotiable security or notes that he might hold on that day.

4. If the jury believe from the evidence that George McDowell left the employment of J. & W. McDowell at St. Louis, and went into business at Washington with said J. & W. McDowell as a partner, the legal presumption is that at said time there was no indebtedness on the part of J. & W. McDowell to George McDowell.

5. If the jury believe from the evidence that George McDowell came to St. Louis without means in the year 1847, and from the time he so came to St. Louis John McDowell or J. & W. McDowell clothed, boarded and schooled him; and that all the money or means of support which he had came either from John McDowell or J. & W. McDowell until the year 1856, when he went into the firm of J. & W. McDowell & Co.; and that the said George McDowell never made any demand on either said John or the said J. & W. McDowell for services during that period; and that there was no contract to pay said George otherwise than as above stated,—this is evidence tending to prove that neither John nor J. & W. McDowell were indebted to said George when he became a member of the said firm in 1856.

6. If the jury believe from the evidence that J. & W. McDowell & Co. were insolvent when John transferred the notes in controversy to George McDowell, or that the mem-

bers of said firm were insolvent, then the said John had no right to transfer said notes to George McDowell.

7. If John McDowell was unable to pay his debts, or the debts of J. & W. McDowell & Co., when he transferred the notes to George, and such transfer was not made in good faith for the purpose of paying a legal and subsisting debt to George, said transfer was void as to creditors.

8. If the jury believe from the evidence that neither the firm of J. & W. McDowell & Co., or either the members of said firm were or was solvent or able to pay their debts on the 31st day of March, 1858, then neither of said parties could make a transfer of any note to the other parties the necessary effect of which would be to hinder or delay his creditors.

9. Unless the jury believe from the evidence that John McDowell was indebted to George to the amount of the notes transferred to him at the time of said transfer, and that such transfer was made in good faith for the purpose of paying a legal existing debt to said George, and not for the purpose or with the intention of hindering or delaying the creditors of said J. & W. McDowell & Co. or of the said John McDowell, they will find for the plaintiffs.

Judgment was entered for the garnishee, and the plaintiffs appealed.

FAGG, Judge, delivered the opinion of the court.

The facts in this case bear a very intimate relation to those in the case of Potter v. Stevens, decided at the present term. Stevens was summoned as a garnishee in the attachment suit of Potter et al. v. McDowell, instituted on the 7th day of April, 1858. In his answer to the interrogatories propounded to him, and which were the usual ones in such cases, he denied any indebtedness to the defendant McDowell, as well as the possession of any property or effects belonging to him. It is to be noted that there were two answers filed by Ste-

vens, one in October, 1858, and an amended answer in September, 1864.

In the first, after stating that he had executed and delivered to John McDowell seven negotiable promissory notes on the 31st day of March, 1858, two for the sum of \$4,450 each, due and payable two and three years after date respectively; and, describing the other five notes, he says, "since which time he has not seen them, or any one of them; and the said Stevens says that he does not know whether the said notes, or any one of them, were, at the time he was garnished as aforesaid, or since said time, in the possession or under the control of the said John McDowell." The garnishment was served April 10, 1858.

In the second amended answer, after reciting the execution and delivery of the same notes to John McDowell, he says that he was informed, and believed, and so averred the fact to be, "that the said John McDowell, prior to the time he was garnished as aforesaid, assigned by endorsement and delivered the said two notes (the first two mentioned) to George McDowell for value received, and that the garnishee duly paid said notes at maturity as he was bound to do," &c.

There was a denial of the answer, and at the trial upon the issues thus presented there was a verdict and judgment for the defendant. This judgment is sought to be reversed by an appeal to this court.

It should be stated in the outset, that whilst the truth of the answer as to all of the notes mentioned had been put in issue by the reply of the plaintiffs, yet they only claimed at the trial to charge Stevens upon the two notes alleged to have been transferred by assignment to George McDowell. These two notes constituted no part of the consideration for the deed to the real estate known as the St. Ange property in the city of St. Louis. This property was the subject of litigation between John C. Potter and this defendant, heretofore referred to. These notes, amounting together to the sum of \$9,000, were alleged to be the consideration for other

real estate, as well as a large number of slaves, conveyed by John McDowell to Stevens at the same date. It should be borne in mind that the two McDowells were brothers-in-law to Stevens; that they were, and had been for many years, on terms of close intimacy with him, and that John McDowell, after conveying at different periods of time all of his real estate and his slaves absolutely, and his household and kitchen furniture in trust, to Stevens, did, in the fall of 1858, remove with his whole family to the house of Stevens, and continued to reside with him until the fall of 1864 without paying any board or rent. George McDowell, according to his own testimony and that of the defendant Stevens also, who testified in the attachment suit against John McDowell, was a single man. He came to St. Louis when a boy, had no property and never accumulated any; his expenses for tuition, clothing and board were borne exclusively by his brother from 1847 to 1856. At this time he became a partner in the store of his brothers John and William McDowell in the city of St. Louis, but was only such to the extent of a certain share of the profits. The evidence shows that all of these conveyances to Stevens were voluntary, and evidently made to prevent his creditors from proceeding against his property for the purpose of collecting their demands. To begin with the testimony showing the embarrassed condition of the firm of J. & W. McDowell & Co. in 1857 and coming down to 31st March, 1858, and the several conveyances of his property to his brother-in-law Stevens, there is nothing to relieve John McDowell from the charge of a continued design to make a fraudulent conveyance of his property and to place it beyond the reach of his creditors. The bare recital of these transactions would seem to be almost sufficient to stamp them with fraud, and to show a guilty knowledge and participation with John both on the part of Stevens and his brother George. As to John McDowell, it shows a purpose to sell his entire property upon a credit extending from one to five years, taking notes for the same, and with



deeds of trust to secure their payment, and then transferring the same to other parties. The idea of there being any sufficient consideration for the assignment of notes amounting to \$9,000 to his brother George, a partner in the firm and liable for its debts to the extent of any means in his possession, as a compensation to him for former services, is simply absurd and not to be entertained for a moment. The position of George McDowell gave him an opportunity of knowing the condition of his brother's affairs, and these conveyances and transfers of all his property and effects were sufficient to affect him with notice of the designs of John, overwhelmed as he was at the time with debts and embarrassments.

The defendant Stevens assumes in his answer to settle the question of his liability to pay these notes after the service of the garnishment upon him. A prudent man under such circumstances, instead of deciding which of the parties claiming the benefit of these notes were really entitled to it, would have asked the protection of the law. Having elected to pay them to George McDowell, he has placed it beyond the power of the court to protect him.

The facts in this case are so numerous, and covering such a variety of transactions, as to make it impracticable to comment upon them fully and for the purpose of showing the conclusions to which they lead. Taken altogether, they disclose on the part of all these men a deliberate purpose to aid and assist in carrying out a fraudulent design, which seems to be apparent and incapable of concealment throughout. That this defendant, who, according to his own statement, was not worth more than the total amount of the notes which he executed to John McDowell, should, without any special inducement moving him thereto, encumber himself with debts in the purchase of this property, is exceedingly improbable, to say the least of it. That he, a farmer, living in St. Louis county, should suddenly, and without assigning any special reason therefor, conceive the idea of buying

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Potter v. Stevens, Garn., &c.

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out a store in the town of Forsyth, in Taney county—an inaccessible and remote point from his residence—and entrust his brother-in-law George McDowell with ten or twelve thousand dollars, to be invested in the mercantile business, only increases the difficulty of accounting for his conduct. The whole story, however, is placed entirely beyond credit by the manner in which he claims to have paid the amount of these notes. George says that in the summer of 1861, and whilst he was carrying on the business at Forsyth, some Federal soldiers, then in that part of the State, marched to the town; fighting commenced at or near the place; he ran off for fear of getting hurt and abandoned the store—all of the goods, excepting a small quantity of iron, being carried off by the soldiers or destroyed. After remaining in the State of Arkansas for about two years he returned to Missouri, when he and Stevens both concluded that he was responsible for the loss of the goods, amounting to just about the sum of the two notes, and they were delivered up in satisfaction of his liability.

This case was tried by the court sitting as a jury. It would only be necessary to notice the declarations of law, given or refused, for the purpose of ascertaining the theory upon which the finding was made. We conclude from an examination of the whole case that it was not supported by the evidence. Stevens cannot escape his liability upon the ground that he has paid these notes in full to George McDowell even if such a statement could be for a moment believed. He cannot be permitted to set up the fraud to protect him, and his liability to the plaintiffs in this proceeding is but the legitimate result of his own wrong doing.

The other judges concurring, the judgment will be reversed and the cause remanded.

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Harris v. Brevator.

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THOMAS M. HARRIS, Respondent, v. JOHN BREVATOR, Appellant.

*Practice—Trials—Evidence—Exceptions.*—If objection be made to the admissibility of a written contract sued upon, the reasons for the objection must be stated in the bill of exceptions.

*Appeal from St. Louis Circuit Court.*

*Davis & Evans*, for appellant.

*E. B. Ewing*, for respondent.

HOLMES, Judge, delivered the opinion of the court.

The suit was founded upon a written contract between the plaintiff and defendant for the delivery of three or four hundred sheep, between the 1st and 20th day of November, 1865, at a certain price per head, at the Wedge House stock-yard in St. Louis, not to contain more than one hundred lambs in the number, and to be sound and healthy, and tolerably free from burs. The petition stated the substance of the contract, and alleged that the plaintiff had in all things complied therewith, but that the defendant had refused to receive the sheep; and the plaintiff had a verdict for \$378.73 damages and costs.

On the trial, the defendant excepted to the admission of the written contract in evidence, for the alleged reason that it did not support the petition. At the close of the plaintiff's evidence, the court refused to instruct the jury, at the instance of the defendant, to the effect that the plaintiff was not entitled to recover. The defendant then proceeded with his testimony, and the cause was submitted to the court, sitting as a jury, without instructions.

The written contract offered in evidence by the plaintiff certainly supported the allegations of the petition. No material ground of variance is pointed out, and none appears to have been made a ground of special exception.

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Anderson v. Holland.

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There was no error in refusing the defendant's instruction. There was some conflict in the testimony as to the soundness of the sheep, but no insufficiency in that of the plaintiff to sustain his cause of action, or to warrant the finding of the court. We find no ground for disturbing the verdict.

Judgment affirmed. The other judges concur.



DAVID ANDERSON, Respondent, v. LEONARD B. HOLLAND, Appellant.

*Revenue—Municipal Corporations—Special Tax—Lien.*—Under the charter and ordinances of the City of St. Louis, the lien of the special tax for the making and repairing of streets and alleys, commences from the date of the assessment of the tax by the city engineer after the work is completed.

*Appeal from St. Louis Circuit Court.*

*Peacock & Cornell*, for appellant.

*Sharp & Broadhead*, for respondent.

FAGG, Judge, delivered the opinion of the court.

By the agreed statement of facts presented, there is but one point for the determination of the court.

Plaintiff sued to recover the sum of \$805, paid by him upon an assessment made upon certain leasehold property in the city of St. Louis. The property in question was conveyed by plaintiff to the defendant by deed dated December 1st, 1860. By special ordinance of said city, approved March 31, 1860, a certain kind of pavement was required to be laid upon the street fronting this property. This work, by the charter and ordinances of the city, is made a charge upon the adjoining property, and a special tax is authorized to be assessed thereon in the name of the owner whenever the work is fully completed. The work was not completed nor the assessment made until the 23d of December, 1860. A

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Anderson v. Holland.

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certified bill of the assessment was made out against the plaintiff as the owner of the property and payment of the same coerced by legal process.

It is agreed that the deed of lease to the plaintiff contained a provision that the lessees and all persons to whom the leasehold interest should be transferred, should, whilst the owners and holders of said interest pay off and discharge all taxes or assessments to be made by the City of St. Louis, or else said leasehold should become forfeited. This tax was an encumbrance upon the property, and the simple question is whether it attached previous to the conveyance to Holland or not. The amended charter of the city approved January 16, 1860, and entitled "An act supplementary to the several acts incorporating the City of St. Louis," as well as the general ordinance entitled "Engineer Department," (Rev. Ord. 352,) contain the provisions regulating the mode of enforcing payment against the property holders in such cases.

We think that this work became a charge upon the property from the date of the assessment and certified tax-bill made out by the city engineer in pursuance of the directions contained in the general ordinance before referred to. This point may be regarded as settled by the former decisions of this court—*City of St. Louis to use, &c. v. Oeters*, 36 Mo. 456; *Same v. Rudolph*, id. 465; *Same v. Clemens*, id. 467. In the last case cited it was expressly held that "there is in these cases a specific tax lien on the lot of ground in question which exists from the date of the assessment." This assessment cannot be made until the work is fully completed and the precise amount of its costs ascertained.

The intention of the law evidently is to make the cost of the work, when ascertained, a direct charge upon the property itself. It was not designed that the city authorities, or the contractor to whom these tax-bills are authorized to be assigned so as to enable him to collect the same in the name of the city, should become parties to any controversies that might exist between the owners of the property to be charged and persons claiming an interest therein under them.

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Wenst v. Schroeder.

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It makes no difference, however, that in this case the bill was made out against Anderson, who never had anything more than a leasehold interest in the property. Having transferred this interest to Holland previous to the attaching of the lien, and the lease itself requiring the party holding the same to protect the owner of the property against all taxes and assessments upon it authorized by the City of St. Louis, Anderson is now entitled to recover back the amount which he paid to the use of Holland.

The judgment of the Circuit Court was therefore for the right party and must be affirmed. The other judges concur.

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GOTTFRIED WENST, Respondent, v. WILLIAM SCHROEDER, Appellant.

*Practice—Supreme Court—Exceptions—Error.*—The Supreme Court will not review the judgment of the court below unless error appear of record, or exceptions be taken and preserved.

*Appeal from St. Louis Circuit Court.*

*Peacock & Cornell*, for appellant.

*J. A. Beal*, for respondent.

FAGG, Judge, delivered the opinion of the court.

This case originated in the Law Commissioner's Court for St. Louis, and under the reorganization of the courts for that county was transferred to and tried in the St. Louis Circuit Court No. 3. The judgment being for the plaintiff, an appeal was taken to the general term, where it was affirmed, and the case brought here by appeal. No exceptions were taken at the trial to the introduction of the testimony, or to any declarations of law; and nothing appearing upon the record which would authorize this court to review the action of the court below, the judgment will be affirmed.

The other judges concur.



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State to use, &c. v. Leutzinger et als.—Cogswell et al. v. Randolph et als.

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STATE OF MISSOURI to use of WILLIAM C. DAGGETT, Appellant, v. JOHN LEUTZINGER, JOSEPH SCHNEIDER, and MARTIN KEARY, Respondents.

*Practice—Supreme Court—Briefs.*—Appeal dismissed upon failure of appellant to file statement and brief.

*Appeal from St. Louis Circuit Court.*

Wm. Kreiter, for appellant.

Jecko & Clover, for respondents.

WAGNER, Judge, delivered the opinion of the court.

In this case the appellant has failed to file any statement and brief as required by law. The appeal will therefore be dismissed. The other judges concur.



WILLIAM C. COGSWELL and WILLIAM FREUDENAU, Respondents, v. PEYTON RANDOLPH, FREDERICK W. RANDOLPH, and ROBERT A. W. CRENSHAW, Appellants.

*Practice—Supreme Court—Assignment of Errors.—Briefs.*—Judgment affirmed, appellants failing to assign errors and file statement and brief.

*Appeal from St. Louis Circuit Court.*

C. F. Burnes, for appellants.

Sharp & Broadhead, for respondents.

WAGNER, Judge, delivered the opinion of the court.

The appellants having neglected to file any assignment of errors or statement and brief in this case, the judgment of the court below will be affirmed.

The other judges concur.



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## A

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ADMINISTRATION (*Continued*).

covenant was personal, affecting only the acts of the parties themselves, and did not extend to the acts of the heirs in prosecuting or defending suits.—*Chambers' Adm'r v. Wright's Heirs*, 482.

3. *Lands—Heirs—Administrators*.—At the death of a party his lands descend to his heirs or devisees, and the personal representative takes no interest therein but a naked power to sell for the payment of debts. The possession of the land as well as the defence of the title belong to the heirs or devisees alone, and the administrator has nothing to do with it.—*Id.*
4. *Demands—Judgments—Land Liens*.—Under the provisions of the act of Administration, R. C. 1855, p. 151, art. 4, § 1, judgments which are liens upon the real estate of the deceased are to be paid out of the proceeds of the sales of the lands, if the estate be insolvent, in the order of the judgment liens, without any regard to the order of allowance or classification in the Probate Court. The intention of the act was to secure to the creditor the fruits of his lien, which he was precluded from following by the death of the debtor. The second subdivision of sec. 1, postponing claims not presented in the first year, does not apply to judgments which were liens upon land if the estate be insolvent.—*Kerr's Adm'r v. Wimer's Adm'r*, 544.
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## B

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## C

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CONTRACTS (*Continued*).

nished with means of transportation to the prejudice and injury of another. The cars should be distributed among the different stations in proportion to the business ordinarily done, so that all freight may be shipped in a reasonable time.—*Ballentine v. N. Mo. R.R. Co.*, 491.

11. *Bailments—Carriers—Railroad Corporations—Negligence*.—A carrier cannot be held liable for negligence if he be prevented from performing his duty by the act of God. A snow storm which blocks up a railroad to the extent that it hinders and delays the running of cars, is such an act.—*Id.*
12. *Bailments—Carriers—Negligence—Damages*.—Carriers are responsible for the natural, ordinary and proximate causes of their acts, but not for such as are remote and extraordinary. The delay occasioned to a plaintiff attempting to ship hogs, and the necessary expenses in feeding and taking care of the same, would be the natural and immediate consequence of the wrong done by the carrier in refusing to receive and ship the freight, but this cannot be said in reference to the loss occasioned either by the death or shrinkage in weight of the hogs, unless it appear that these effects were in some manner caused directly by the act of the carrier.—*Id.*
13. *Bailment—Agistment—Negligence—Practice—Trials*.—A bailee taking cattle to pasture and keep is not an insurer, and is only liable for losses occasioned by his own negligence. Where the petition alleged that cattle bailed to pasture were lost through the carelessness and negligence of the bailee, the burden of proof to show negligence is upon the plaintiff; and if that be not shown, the defendant may ask the court to instruct the jury that the plaintiff is not entitled to recover.—*McCarthy v. Wolfe*, 520.

See BILLS AND NOTES, 6, 7. PRINCIPAL AND AGENT. EQUITY. INSURANCE.

## CONVEYANCES.

1. *Contract—Description—Quantity—Consideration*.—Where land is sold at a given price per acre for the aggregate quantity contained in the tract, specified at a certain number of acres more or less, no provision being made for a survey to ascertain the precise quantity to fix the amount to be paid, the price and number of acres are to be taken as showing the amount to be paid.—*Sullivan v. Ferguson et als.*, 79.
2. *Recording—Practice—Fraud*.—Under the statute of Fraudulent Conveyances, R. C. 1855, p. 802, § 8, the recording of a mortgage or deed of trust of personal property imparts notice to all subsequent claimants of the title of the mortgagee, although possession do not accompany the deed. The acknowledgment and recording of the deed removes the presumption of fraud arising from the possession not accompanying the deed. The deed imparts notice from the time of its being filed for record. (R. C. 1855, p. 364, § 41.)—*Miller v. Whitson et al.*, 97.
3. *Evidence—Certified Copies*.—Certified copies of conveyances may be read in evidence under the statute, R. C. 1855, p. 365, § 46, when the original is not in the control or possession of the party, his agents or bailees.—*Barton v. Murrain*, 27 Mo. 235. A deed in trust will be presumed to be in the

CONVEYANCES (*Continued*).

- possession of the trustees or their beneficiaries.—*Boyce's Trustees v. Moon-ey et al.*, 104.
4. *Revenue—Register's Deed—Lands and Land Titles.*—The deed of the Register is *prima facie* evidence of title in the purchaser at a tax sale only when the deed is duly acknowledged and recorded in conformity with the statute relating to conveyances—*Stierlein v. Daley et als.*, 37 Mo. 483, affirmed.—*Dalton v. Fenn et al.*, 109.
  5. *Revenue—Collector's Certificate—Lands and Land Titles.*—Under the revenue act of 1857, to make the collector's certificate of sale for taxes *prima facie* evidence of right of possession in the purchaser at the sale, the certificate must be executed, acknowledged and recorded in the same manner as a conveyance of land. After the two years limited for redemption have passed, the holder of the certificate may procure a deed, but he cannot defend his possession against a party showing a legal title upon the certificate merely.—*Id.*
  6. *Description—Evidence.*—Where a particular tract of land cannot be located by the calls for monuments, or for course and distance, the intent of the parties is not to fail if there be any other matter indicative of such intent.—*Schultz v. Lindell's Heirs*, 330.
  7. *Evidence—Notice—Records—Lands and Land Titles.*—Notice is either actual or constructive. It is actual when the purchaser knows of the existence of the adverse claim, or is conscious of having the means of knowledge, although he may not use them; it is constructive when the law presumes it. *Speck v. Riffin*, 405.
  8. *Equity—Substitution—Notice.*—A., without actual knowledge of an attachment, purchased land subject to the encumbrance of a deed of trust, which was paid out of the purchase money and released upon the record, the title having been reported upon as subject only to the encumbrance of the deed of trust. Under the judgment in the attachment suit the land was subsequently sold. *Held*, that A. had no equity, to have entry of satisfaction set aside, to be substituted in the place of the original *cestui que trust*, and to have the property sold to pay the amount originally secured by the deed of trust; and that he must be treated as a purchaser with full notice. *Wade v. Beldmeir et als.*, 486.

## CORPORATIONS.

1. *Bailments—Carriers—Railroads.*—The amount of business ordinarily done by a railroad is the only proper measure of its obligation to furnish transportation: if, from any reason, there is a sudden influx of freight demanding transportation, the obligation will be met merely by shipping the freight in the order of time in which it is offered. The freight is to be shipped in the order of time in which it is offered at the particular station, and not with reference to the entire line of the road; but no one station should be furnished with means of transportation to the prejudice and injury of another. The cars should be distributed among the different stations in proportion to the business ordinarily done, so that all freight may be shipped in a reasonable time.—*Ballentine v. North Mo. R.R. Co.*, 491.

CORPORATIONS (*Continued*).

2. *Charter—Amendments—Acceptance.*—The acceptance of a charter by the corporation, and the acceptance of amendments to an existing charter, may be proved by the acts of the officers and members of the corporation, from which the fact of acceptance may be inferred.—*Sumrall v. Sun Mut. Ins. Co.*, 27.
3. *Franchise—Execution Levy.*—The franchise of a corporation cannot be levied upon and sold under execution.—*Stewart v. Jones*, 140.
4. *Limitations—Accruting of Action—City of St. Louis.*—Under the provisions of the charter of the City of St. Louis (February 23, 1853), providing for the condemnation of property for streets and alleys, where the title to the land taken for a street was in dispute between parties, no cause of action accrued against the city for the damages assessed until the question of title was determined by a court of competent jurisdiction in favor of the claimant.—*Soulard v. City of St. Louis*, 144.
5. *Principal and Surety—By-laws.*—The negligence of the directors and cashier of a bank in failing to comply with the by-laws of the corporation in examining its affairs, counting its cash, &c., &c., will not discharge the sureties upon the bond of the teller, who has committed a breach of his obligations by applying the moneys of the bank to his own use.—*State to use, &c. v. Atherton et al.*, 209.
6. *Railroads—Negligence.*—The peculiar character of the vehicles employed by street railroads running through the crowded thoroughfares of a city makes it incumbent upon every company to exercise care and diligence to avoid collisions and accidents; no other rule can be recognized as compatible with the safety and security of the public. But this rule does not dispense with the care and prudence required of all persons using the street in common with the railroad company.—*Liddy v. St. Louis R.R. Co.*, 506.
7. *Street Railroads—Municipal Corporations—Negligence.*—The ordinance of the City of St. Louis regulating the running of cars on the street railroads within the limits of the city, imposes certain duties on the companies, and the violation of such regulations shows negligence in the management of the cars on such roads.—*Id.*
8. *Action—Negligence—Highways.*—Municipal corporations are bound to keep the streets and highways in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel, and if they neglect so to do they will be liable for all injuries happening by reason of their negligence; and they cannot avoid this responsibility by arrangements with other parties.—*Blake v. City of St. Louis*, 569.
9. *Revenue—Residence.*—A corporation is a resident subject or citizen of the State in which it is created, regardless of the residence of its members or stockholders; but although the corporation itself cannot migrate or go out of the State creating it, it may by its agents act beyond the bounds of the State in which it exists, and thus become liable in other States to service of process upon its agents, and its property locally situate in such States may be subjected to taxation.—*City of St. Louis v. Wiggins Ferry Co.*, 580.
10. *Revenue—Residence—Personal Property—Assessment.*—The personal property of a resident actually situated beyond the limits of this State, is without its

CORPORATIONS (*Continued*).

jurisdiction, and cannot be assessed for taxation in this State ; but the property of a non-resident is taxable here if it be found situate within the local jurisdiction, whether in the hands of the owner or his agents.—*Id.*

11. *Revenue—Boats and Vessels.*—Ferry boats owned by a corporation created by the laws of the State of Illinois, and running between the Illinois and Missouri shores, are subject to taxation in this State, and by municipal corporations, if the companies owning said boats have an office for the transaction of business in this State within the limits of such city or town. For the purposes of taxation, such foreign corporation having an office and doing business within this State is to be considered a resident.—*Id.*
12. *Revenue—Special Tax—Lien.*—Under the charter and ordinances of the City of St. Louis, the lien of the special tax for the making and repairing of streets and alleys commences from the date of the assessment of the tax by the city engineer after the work is completed.—*Anderson v. Holland*, 600.

## COURTS.

1. *Constitution—Crimes—Court of Criminal Correction.*—The provisions of Gen. Stat. 1865, p. 895, § 15, providing that in the county of St. Louis all misdemeanors shall be proceeded with by information in the Court of Criminal Correction, are not in conflict with the provisions of sec. 24, art 1, of the Constitution ; neither does the law organizing the court violate that provision of the Constitution forbidding the General Assembly from passing special laws.—*State v. Ebert*, 186.
2. *Boats and Vessels—Jurisdiction—Admiralty.*—Stores and supplies furnished to a steamboat at the home port in this State do not give an admiralty or maritime lien so as to oust the jurisdiction of the courts of this State, and the remedy given by our statute may be enforced against the boat by name. See *post* *Boylan et al. v. St. Bt. Victoria* ; *Hogan et al. v. St. Bt. Minnie*, and *Connelly v. St. Bt. Bee*.—*Cavender et al. v. St. Bt. Fanny Barker*, 236.
3. *Jurisdiction—Boats and Vessels.*—A contract made at the home port of a boat or vessel with the master or owner for supplies furnished to such vessel, is a land contract made and completed within the body of a county, and the courts of this State have jurisdiction to enforce such contract against the boat or vessel by subjecting it to sale as provided by the statute—Gen. Stat. 1865, ch. 193. Such a contract is not within the exclusive jurisdiction of the admiralty.—*Boylan et al. v. St. Bt. Victory*, 244.
4. *Jurisdiction—Boats and Vessels—Admiralty.*—Where the cause of action by a mariner for wages, for services rendered on the boat, accrues beyond the territorial jurisdiction of this State, the contract is within the exclusive jurisdiction of the admiralty, and the mariner cannot maintain an action against the boat in our courts.—*Connelly v. St. Bt. Bee*, 263.
5. *Boats and Vessels—Jurisdiction—Admiralty.*—A contract for work and labor done and materials furnished in repairing a vessel at her home port, is not a maritime contract, and may be enforced against the boat under the statute of this State.—*Hogan et al. v. St. Bt. Minnie*, 264.



## COVENANT.

See ADMINISTRATION, 2.

## CRIMES.

*Gaming—Criminal Practice.*—In a prosecution under the act, Gen. Stat. ch. 206, § 18, it is a sufficient defence that the premises occupied by the gambling device, and in which gambling was carried on, were not in the actual possession or control of the defendant, but were occupied by another person under a lease from defendant.—*State v. Ebert*, 186.

## D

## DAMAGES.

1. *Evidence—Negligence—Action—Practice—Trials—Instructions.*—The existence of negligence is a fact to be proved, and for the jury to determine, when there is competent evidence tending to prove it; but the question, what facts and circumstances, being proved, amount to evidence of the existence of the main fact in issue, or tend to prove it, is a question of law. Where the evidence presented by plaintiff does not sustain the plaintiff's cause of action, it is the duty of the court so to instruct the jury.—*Callahan v. Warne et als.*, 131.
2. *Replevin Bond—Sheriff—Practice.*—A party who makes himself the principal in a replevin bond, although not the plaintiff in the suit, will be liable to have judgment entered against him as principal. A stranger taking the property out of the hands of the sheriff by an action for the delivery of personal property, will be liable, if he fail to show title, for the whole value of the property taken out.—*Frei v. Vogel*, 149.
3. *Action—Covenant—Landlord and Tenant*—In an action of covenant by the lessee against the lessor for failing to build a sufficient wall in accordance with his covenant, the lessee can recover such damages only as are direct and immediate, but not remote, speculative or contingent damages, or such as might have been avoided by his own act. The proper measure of damages would be the cost of repairing or building the wall, and compensation for the use of the premises of which he was deprived while they were undergoing repairs.—*Fisher v. Goebel*, 475.
4. *Bailments—Carriers—Negligence.*—Carriers are responsible for the natural, ordinary and proximate causes of their acts, but not for such as are remote and extraordinary. The delay occasioned to a plaintiff attempting to ship hogs, and the necessary expenses in feeding and taking care of the same, would be the natural and immediate consequence of the wrong done by the carrier in refusing to receive and ship the freight, but this cannot be said in reference to the loss occasioned either by the death or shrinkage in weight of the hogs, unless it appear that these effects were in some manner caused directly by the act of the carrier.—*Ballentine v. North Mo. R.R. Co.*, 491.
5. *Practice—Replevin.*—If in an action for the delivery of personal property the verdict be for the defendant, the measure of damages will be the value of the property at the time of its taking under the writ, with legal interest thereon up to the time of trial.—*Miller v. Whitson et al.*, 97.

See FIXTURES.

## DOMICIL.

See ATTACHMENTS, 2.

## DOWER.

1. *Wills — Devtse — Election.*—A widow may always refuse to take under a will as a devisee or legatee, and may fall back on her claim for statutory dower, but she cannot claim under the will and under the statute at the same time; she must make her election, and claim under the one and reject the other. The widow does not take under the will as a purchaser, so as to have the portion bequeathed and devised to her discharged from liability for payment of the debts of the testator, when the burden of the debts is imposed generally upon the whole of the estate.—Brant's Will, 266.
2. *Admeasurement — Annual Value.*—In assessing the annual value of the dower of the widow in land not susceptible of being admeasured, the value is to be determined from what may be the net annual product without the expenditure of money or labor after deducting all charges to which the land is subject, such as taxes, repairs, &c. See *Clamorgan v. Rippey*, 15 Mo. 331.—*Reily v. Bates*, 468.

## E

## EJECTMENT.

1. *Practice — Judgment — Execution — Error.*—Although the description of the land in a judgment in ejectment be so vague that the officer cannot execute the writ of possession, that will not be a ground for reversal of the judgment in the Supreme Court.—*Snyder v. Raab*, 166.
2. *Lands and Land Titles — School Lands — Entry — Sale and Patent — Confirmation — Outstanding Title.*—A party in possession of land under an entry, sale, and patent issued in 1826, may, against the claim of the St. Louis Public Schools under the acts of June 13, 1812, and January 27, 1831, set up as an outstanding title a claim and confirmation by virtue of the act of July 4, 1836. The confirmer, although by the terms of the act he cannot recover the land as against the patentee, still has a right to locate other lands in lieu of those sold, and his title is not absolutely void.—*St. Louis Pub. Schools v. Walker et al.*, 383.
3. *Forcible Entry and Detainer — Possession — Tenants in Common.*—The possession of one tenant in common is the possession of all. Where two are in possession together, and one only is turned out, and the other still remains, his possession is for his co-tenant as well as himself. (*Garrison v. Savignac*, 25 Mo. 47.)—*Bernecker v. Miller et al.*, 473.

See CONVEYANCES. LANDS AND LAND TITLES. EQUITY. PRACTICE, CIVIL.

## EQUITY.

1. *Insurance — Policy — Agreement — Mistake.*—A court of equity will reform a policy or other written contract, upon parol evidence, when the agreement really made between the parties has not, through accident or mistake, been correctly incorporated into the written instrument; but both the agreement and the mistake must be made out by the clearest evidence, according to the understanding of both parties as to what the contract was intended to

EQUITY (*Continued*).

- be. The court cannot supply an agreement that was never made.—*Tesson v. Atlantic Mut. Ins. Co.*, 33.
2. *Bills and Notes—Notice—Agency*.—A party acquiring a note through an agent after its maturity, takes it subject to the equities then existing between the parties; and the principal is affected with notice of all the facts made known to his agent in the transaction.—*Livermore v. Blood et al.*, 48.
3. *Bills and Notes—Endorsements—Title*.—A party taking from the agent of the payee a note endorsed in blank, before maturity, in good faith, as a collateral security for debt of a third party, is not affected by the fraud of the agent in disposing of the note.—*Paulette v. Brown*, 52.
4. *Agent—Factor—Trust*.—Where an agent acts for an agreed compensation, or where there is no contract for a reasonable compensation, he will not be allowed to retain profits incidentally made in the execution of his duty, although it may have the sanction of usage. Where a person is actually or constructively an agent, all profits made in the business, beyond his ordinary compensation, are for the benefit of his employers.—*Jacques et als. v. Edgell et al.*, 76.
5. *Sale—Mortgage—Fraud*.—Where the sale, under a deed of trust to secure payment of a debt, was procured by fraud by lulling the owner of the land into security by the promise of the creditor not to sell without first making demand, the court set aside the sale and granted permission to redeem. (See S. C., 35 Mo. 95.)—*Clarkson et als. v. Creely et al.*, 114.
6. *Lands and Land Titles—Confirmations—Patents—Claims*.—Under different confirmations under the laws of the United States, the first equities against the Government of which a court can take notice are the inceptive acts, such as filing claims, &c., required by the statutes providing for such confirmations. Prior to such acts, unconfirmed claims or inchoate titles present nothing but an equity addressed to the political power, of which courts cannot take cognizance. The decision of the Government is final as to the comparative merit of all such claims.—*Magwire v. Tyler et als.*, 406.
7. *Lands and Land Titles—Judgment—Estoppel—Error*.—A decree in chancery between the same parties, proceeding upon the same substantial facts and grounds of equity, is conclusive. M. brought his bill, claiming an equitable title to a part of a tract of land patented to L. upon the ground that the part claimed had been confirmed to him by the United States, and that the survey made for L. was erroneous. The facts were found, and decree rendered against M. Subsequently M. procured a survey and patent for the land and brought a new bill—*Held*, that the former decree was conclusive as to the equities between the parties.—*Id.*
8. *Substitution—Conveyances—Notice*.—A., without actual knowledge of an attachment, purchased land subject to the encumbrance of a deed of trust, which was paid out of the purchase money and released upon the record, the title having been reported upon as subject only to the encumbrance of the deed of trust. Under the judgment in the attachment suit the land was subsequently sold. *Held*, that A. had no equity, to have entry of satisfaction set aside, to be substituted in the place of the original *cestui que trust*, and to have the property sold to pay the amount originally secured by the

EQUITY (*Continued*).

deed of trust; and that he must be treated as a purchaser with full notice.  
—*Wade v. Beldmeir et als.*, 486.

9. *Practice—Action—Interpleader.*—One of two parties claiming property in the hands of a third party, cannot bring a suit of equity against the other claimant and the holder, to have the rights of the parties determined as upon a bill of interpleader. A bill of interpleader lies only when the party holding the property asserts no interest therein, and is threatened with suits by different persons claiming the same property.—*Hathaway v. Foy et al.*, 540.
10. *Notice—Lis pendens.*—A suit pending is not notice to a purchaser so as to affect and bind his interest until the writ is served after petition filed.—*Metcalf et al. v. Smith's Heirs*, 572.

## ERROR.

See JUDGMENT. PRACTICE, CIVIL.

## ESTOPPEL.

1. *Judgment—Record—Evidence.*—The record of a judgment, in a former suit between the same parties, to constitute an estoppel, must show that the same subject matter had been passed upon and adjudicated in that suit.—*Clemens v. Murphy*, 121.
2. *Judgments.*—The doctrine of the conclusiveness of judgments conduces to peace and repose, and it cannot be disturbed without unsettling rules of property and producing irreparable mischief.—*Speck v. Riffin*, 405.
3. *Lands and Land Titles—Judgment—Equity.*—A decree in chancery between the same parties, proceeding upon the same substantial facts and grounds of equity, is conclusive. M. brought his bill, claiming an equitable title to a part of a tract of land patented to L. upon the ground that the part claimed had been confirmed to him by the United States, and that the survey made for L. was erroneous. The facts were found, and decree rendered against M. Subsequently M. procured a survey and patent for the land and brought a new bill—*Held*, that the former decree was conclusive as to the equities between the parties.—*Magwire v. Tyler et als.*, 406.
4. *Landlord and Tenant.*—A landlord may by his acts be estopped from setting up a breach of the conditions of the lease and demanding a forfeiture.—*Garnhart v. Finney*, 449.
5. *Insurance—Double Insurance—Notice—Agent.*—The policy sued on contained a clause providing that if the insured should procure any other insurance, and should not with all reasonable diligence give notice to the company, and have the same endorsed on the policy or otherwise acknowledged in writing, that the policy should cease and be of no further effect. The application for insurance was made for \$10,000; the agent of the defendant stated that by its rules the company could take but \$5,000 on any one risk, and offered to procure the insurance for the remaining \$5,000; which he did the next day, and notified the defendant, which did not object. The premium was subsequently paid and the policy delivered. *Held*, that it was the duty of the company, upon being notified by its own agent of the addi-

ESTOPPEL (*Continued*).

tional insurance, to endorse the same upon the plaintiff's policy or to notify him of the refusal of the risk, and that, having failed so to do, it was estopped from setting up as a defence the failure to have such additional insurance endorsed upon the policy.—*Horwitz v. Equitable Mut. Ins. Co.*, 557.

## EVIDENCE.

1. *Experts—Insurance*.—A witness who has been many years an officer of an insurance company, and has become acquainted with the business of fire insurance, is competent to give his opinion as to the effect produced by the erection of additions to the buildings insured.—*Kern v. South St. Louis Mut. Ins. Co.*, 19.
2. *Witness—Practice—Contradiction*.—It is proper to instruct a jury, that if a witness has wilfully and knowingly sworn falsely to any material matter in the case, then the jury are authorized to discredit the whole of the testimony of said witness.—*Paulette v. Brown*, 52.
3. *Ambiguity*.—Parol evidence is admissible to explain the latent ambiguities of an instrument and to aid in its interpretation.—*Schultz et al. v. Bailey et als.*, 69.
4. *Agent—Authority*.—The authority of an agent may be shown by the subsequent ratification of his acts by the principal.—*Id.*
5. *Carrier*.—In a suit against a carrier for the non-delivery of a trunk shipped, testimony to show what was the contents of the trunk at the time it was packed, some weeks before its delivery to the carrier, is admissible, although the carrier can only be held responsible for the contents of the trunk at the time of its receipt.—*Sugg v. Memphis & St. Louis Packet Co.*, 442.
6. *Conveyances—Certified Copies*.—Certified copies of conveyances may be read in evidence under the statute, R. C. 1855, p. 365, § 46, when the original is not in the control or possession of the party, his agents or bailees.—*Barton v. Murrain*, 27 Mo. 235. A deed in trust will be presumed to be in the possession of the trustees or their beneficiaries.—*Boyce's Trustees v. Mooney et al.*, 104.
7. *Conveyances—Description*.—Where a particular tract of land cannot be located by the calls for monuments, or for course and distance, the intent of the parties is not to fail if there be any other matter indicative of such intent.—*Schultz v. Lindell's Heirs*, 330.
8. *Conveyances—Notice—Records—Lands and Land Titles*.—Notice is either actual or constructive. It is actual when the purchaser knows of the existence of the adverse claim, or is conscious of having the means of knowledge, although he may not use them; it is constructive when the law presumes it.—*Speck v. Riggins*, 405.
9. *Estoppel—Record—Judgment—Administration*.—Parol evidence is not admissible in a collateral suit to contradict the record of the Probate Court, showing that the lands of an intestate had been sold to pay debts.—*Lamothe et ux. v. Lippott*, 142.
10. *Res Gestæ*.—What the defendants said in relation to their having paid an account presented to them, is part of the *res gestæ* when testimony is given

EVIDENCE (*Continued*).

- of the presenting the account and of the defendants' refusal to pay.—*Webster et al. v. Canmann et al.*, 156.
11. *Practice—Depositions—Trials.*—Exceptions to questions and answers, made during the taking of a deposition, must be presented to the court and passed upon at the trial. The whole deposition cannot be excluded because part of the testimony is objectionable.—*Id.*
  12. *Boats and Vessels—Admissions.*—The admissions of an owner are admissible in evidence in a suit against the boat.—*Boylan v. St. Bt. Victory*, 244.
  13. *Lands and Land Titles—Confirmations—Surveys—Location.*—A confirmation under the act of Congress of June 13, 1812, to a lot, out-lot or common-field lot by virtue of inhabitation, cultivation or possession prior to the 20th December, 1803, supersedes any title under a French or Spanish concession subsequently confirmed by the act of July 4, 1836; but the surveys under the latter confirmation may be used as evidence to show the location and boundaries of the lot confirmed by the prior act.—*Schultz v. Lindell's Heirs*, 330.
  14. *Practice—Trials—Discretion.*—The Supreme Court will not review the discretion of the inferior court in admitting evidence out of its proper order.—*St. Louis Pub. Schools v. Risley's Heirs*, 358.
  15. *Hearsay—Public Rights.*—Tradition, reputation and hearsay are admissible to prove the extent, character and existence of public rights as regards the location and boundaries of things of a public nature, as of a highway, street, or road.—*Id.*
  16. *Tax Receipts—Hearsay—Limitations.*—Evidence as to the payment of taxes is admissible in suits for the possession of land for the purpose of showing adverse possession, or the extent and boundaries of the land possessed.—*Id.*
  17. *Practice—Deceased Witness.*—The testimony given by a deceased witness at a previous trial cannot be read from the bill of exceptions without laying the proper foundation for its introduction, by proving by the testimony of a witness competent to testify, the accuracy of the minutes of the testimony of the deceased witness; the substance of what the witness swore to must be proved like other hearsay evidence.—*Morris et al. v. Hammerle*, 489.
  18. *Mechanic's Lien—Contractor—Owner—Furnishing Materials.*—In an action under the Mechanic's Lien Law, to enforce a lien for materials furnished to the contractor with the owner of the building, it is not necessary for the plaintiff to show that the materials furnished were actually used in the construction of the building; it is sufficient that (in the absence of collusion and fraud) the materials were furnished for the purpose of being used in the building. The statements of the contractor are admissible in evidence to show the purposes for which the materials were purchased.—*Morrison v. Hancock et als.*, 561.

See PRACTICE, CIVIL. WITNESSES.



## EXECUTIONS.

1. *Practice—Party—Sheriff—St. Louis County.*—Under the provisions of the statute "concerning the duties of sheriff in St. Louis county," of March 3, 1855, and March 14, 1859, the beneficiary in a deed of trust of personal property may file his claim with the sheriff, and sue upon the bond taken. He is a party in interest under the statute. See R. C. 1865, ch. 160, secs. 28 & 29.—*State to use, &c., v. McKellop et als.*, 184.
2. *Officer—Sheriff—Fees.*—Under the statute relating to fees, R. C. 1855, p. 768-9, § 13, the sheriff is only entitled to half commissions when he receives the money without making a levy, or when he makes a levy and the money is paid to the sheriff or the party entitled without a sale.—*Gaty v. Vogel*, 553.

## F

## FIXTURES.

1. *Vendor and Vendee—Lands and Land Titles—Organ.*—Lamps, chandeliers, candelabra, sconces, brackets, and the various contrivances for lighting houses by means of candles, oil or other fluids, or gas, are not fixtures, and do not form part of the freehold so as to pass by a sale of the realty. Where in the erection of a church a recess was left to receive an organ, which was required to complete the design and finish of the building, the organ being attached to the floor and intended to be permanent—*held*, that the organ was to be considered as affixed to the freehold, and passed, as between vendor and vendee, by a sale of the realty.—*Rogers et als. v. Crow et als.*, 91.
2. *Landlord and Tenant—Injunction—Damages.*—Where the landlord, before the expiration of the term, enjoins the tenant from removing the fixtures, the tenant will be allowed a reasonable time after the dissolution of the injunction within which to demand and remove the fixtures, although the term may have expired pending the injunction. The value of the fixtures is not to be assessed as damages upon dissolution of the injunction.—*Bircher v. Parker*, 118.

See LANDLORD AND TENANT. VENDORS AND PURCHASERS.

## FORCIBLE ENTRY AND DETAINER.

See EJECTMENT, 3.

## FRAUDULENT CONVEYANCES.

1. *Attachment—Garnishment—Interpleading.*—A party summoned as a garnishee, upon an allegation that he had executed his promissory notes to the defendant in the attachment suit, and that he had combined with said defendant in an attempt to defraud his creditors, cannot protect himself by showing that he had subsequently paid said notes to an assignee who was also a participant in the fraudulent acts of the defendant in the attachment. (See *ante* *Potter v. Stevens*, 229, and *Potter v. McDowell*, 31 Mo. 62.) To protect himself, the garnishee should have filed his bill requiring the holder of the notes and the plaintiff to interplead.—*Potter et als., v. Stevens, Garn., &c.*, 591.
2. *Recording—Practice—Fraud.*—Under the statute of Fraudulent Conveyances, R. C. 1855, p. 802, § 8, the recording of a mortgage or deed of trust

FRAUDULENT CONVEYANCES (*Continued*).

of personal property imparts notice to all subsequent claimants of the title of the mortgagee, although possession do not accompany the deed. The acknowledgment and recording of the deed removes the presumption of fraud arising from the possession not accompanying the deed. The deed imparts notice from the time of its being filed for record. (R. C. 1855, p. 364, § 41.)—*Miller v. Whitson et al.*, 97.

3. *Use of Grantors—Creditors—Practice.*—Where it is apparent upon the face of the deed of assignment or mortgage made by insolvent debtors that the deed was made for the purpose of hindering, delaying or defrauding creditors, it is the duty of the court to instruct the jury that the deed is void, and the question of the intent of the grantors should not in such case be left to the determination of the jury. And when upon the face of the deed of assignment it appeared that the parties supposed that there would be a large surplus after paying the debts described, and the whole property was protected from all forced sales or attachments and levies for the period of two years, during which period the management of the business was to be under the supervision of the grantors—*held*, that upon its face the deed appeared to be made for the purpose of hindering, delaying and defrauding creditors, and was void.—*Bigelow et als. v. Stringer et als.*, 195.
4. *Purchasers—Grantee.*—A party accepting a conveyance of land made in fraud of creditors, for the purpose of assisting the debtor in his fraudulent acts, although he pay full value for the property, will be treated as a partaker in the fraud, and the conveyance will be held to be fraudulent and void.—*Potter v. McDowell*, 31 Mo. 62.—*Potter v. Stevens*, 229.
5. *Purchaser without Notice—Mortgagee—Assignment of Debts.*—A mortgage is in equity considered as a security for the debt, and a transfer or assignment of the debt, or any part thereof, transfers the mortgage *pro tanto*. A mortgagee is a purchaser under the act relating to fraudulent conveyances.—*Id.*
6. *Practice—Parties.*—A judgment was rendered against a defendant as a fraudulent grantee avoiding a deed made to defraud the creditors of the grantor, without making the holders of the notes secured by the grantee's mortgage or deed of trust parties to the suit. *Held*, that as the holders of the notes were not made parties, their interest could not be affected by the decree, and that, under the circumstances, the point not having been raised in the lower court, the court would not reverse the decree setting aside the fraudulent conveyance.—*Id.*
7. *Practice.*—Conveyances held to have been fraudulent and void as a matter of fact.—*Allen v. Berry et al.*, 282.

## H

## HIGHWAYS.

See CORPORATIONS, 4, 6, 7.

*Action—Municipal Corporations—Negligence.*—Municipal corporations are bound to keep the streets and highways in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel, and if they neglect so to do they will be liable for all injuries happening by reason of their

HIGHWAYS (*Continued*).

negligence; and they cannot avoid this responsibility by arrangements with other parties.—*Blake v. City of St. Louis*, 569.

## HUSBAND AND WIFE.

*Bills and Notes—Separate Estate.*—A note executed by a married woman is, as a contract, void, and she cannot be made personally liable therefor. The holding of land in fee by a married woman does not create a separate estate so as to make her liable upon a note signed by her.—*Bauer et ux. v. Bauer*, 61.

## I

## INFANCY.

See LIMITATIONS.

## INJUNCTION.

See FIXTURES. PRACTICE, CIVIL.

## INSURANCE.

1. *Policy—Representation—Interest—Title.*—A fire insurance policy contained a clause to the effect, "that if the interest in the property to be insured be a leasehold, trustee, mortgagee or reversionary interest, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing; otherwise the insurance shall be void." The plaintiffs insured the property as owners; their title was a purchase at a sale under the foreclosure of a mortgage in the State of Illinois, by the laws of which the mortgagor had fifteen months after sale within which to redeem; before the execution of the deed to the plaintiffs the property insured was destroyed by fire, and subsequently the plaintiffs received a deed to the property. *Held*, that the terms of the policy referred not to the nature of the title, whether legal or equitable, but to the nature of the ownership of the property; and further, that the plaintiffs having subsequently acquired the legal title by the deed, the legal title should relate back and take effect from the inception of the equitable title by the purchase at the sale under the foreclosure, so that the plaintiffs at the time the policy was issued were the owners of the property, holding the legal title in fee.—*Gaylord et al. v. Lamar Fire Ins. Co.*, 13.
2. *Policy—Risk.*—When the alterations and additions to a building materially increase the risk, so that the insurer would be entitled to a higher rate of premium, the policy will be treated as absolutely void if the insured fail to give the notice required.—*Kern v. South St. Louis Mut. Ins. Co.*, 19.
3. *Policy—Equity—Agreement—Mistake.*—A court of equity will reform a policy or other written contract, upon parol evidence, when the agreement really made between the parties has not, through accident or mistake, been correctly incorporated into the written instrument; but both the agreement and the mistake must be made out by the clearest evidence, according to the understanding of both parties as to what the contract was intended to be. The court cannot supply an agreement that was never made.—*Tesson v. Atlantic Mut. Ins. Co.*, 33.

INSURANCE (*Continued*).

4. *Policy—Description—Warranty.*—If there be such a variance in the description in the policy as will amount to a breach of warranty in any material respect, the policy will be void, although the insured or his agent intended to effect an insurance on the property by whatever description might be correct. Whether the description in the policy covers or fairly describes the property intended to be insured, is a matter of fact for a jury to determine, and the terms of the policy are to be reasonably construed with reference to the whole subject matter.—*Id.*
5. *Charter—Policy—Risk.*—The charter of an insurance company, which was printed on and made part of the policy, provided that the insurance should be void if any alteration were afterwards made in the building insured, or if any other building should be erected or placed contiguous thereto, whereby it might be exposed to greater risk or hazard than it was when insured, unless done with the consent of the directors. In a suit upon the policy, *held*, that the burden of proof was upon the company to show a violation of the terms of the policy; and that it was properly left to the jury to determine whether any contiguous buildings had been erected so as to increase the risk that had been taken.—*Ritter et al. v. Sun Mut. Ins. Co.*, 40.
6. *Double Insurance—Notice—Estoppel—Agent.*—The policy sued on contained a clause providing that if the insured should procure any other insurance, and should not with all reasonable diligence give notice to the company, and have the same endorsed on the policy or otherwise acknowledged in writing, that the policy should cease and be of no further effect. The application for insurance was made for \$10,000; the agent of the defendant stated that by its rules the company could take but \$5,000 on any one risk, and offered to procure the insurance for the remaining \$5,000; which he did the next day, and notified the defendant, which did not object. The premium was subsequently paid and the policy delivered. *Held*, that it was the duty of the company, upon being notified by its own agent of the additional insurance, to endorse the same upon the plaintiff's policy or to notify him of the refusal of the risk, and that, having failed so to do, it was estopped from setting up as a defence the failure to have such additional insurance endorsed upon the policy.—*Horwitz v. Equitable Mut. Ins. Co.*, 557.
7. *Policy—Premium.*—A policy was sent to the assured with a note for the premium to be signed by the assured and endorsed by a responsible endorser; it being understood that until the note was returned the policy did not take effect. *Held*, that the execution of the note was a condition precedent to the taking effect of the policy; and that the parties to whom the sum insured was payable in case of loss, could have no greater right than the party under whom they claimed.—*Bidwell et al. v. St. Louis Floating Dock & Ins. Co.*, 42.

## J

## JUDGMENTS.

See ESTOPPEL, 3. ADMINISTRATION, 1, 4.

## JURISDICTION.

See BOATS AND VESSELS, 1, 3, 6, 12, 13, 14. CONSTITUTION, 1. CORPORATIONS, 9, 10. EQUITY, 9. COURTS.

## JUSTICES' COURTS.

*Filing Transcripts—Practice.*—When the transcript of a justice's judgment is filed in the office of the clerk of the Circuit Court, the court acquires jurisdiction of the case, and may, on cause shown, set aside or modify the judgment—R. C. 1855, p. 961, § 19.—Bauer et ux. v. Bauer, 61.

## L

## LANDLORD AND TENANT.

1. *Injunction—Damages—Fixtures.*—Where the landlord, before the expiration of the term, enjoins the tenant from removing the fixtures, the tenant will be allowed a reasonable time after the dissolution of the injunction within which to demand and remove the fixtures, although the term may have expired pending the injunction. The value of the fixtures is not to be assessed as damages upon dissolution of the injunction.—Bircher v. Parker, 118.
2. *Damages—Covenant.*—In an action of covenant by the lessee against the lessor for failing to build a sufficient wall in accordance with his covenant, the lessee can recover such damages only as are direct and immediate, but not remote, speculative or contingent damages, or such as might have been avoided by his own act. The proper measure of damages would be the cost of repairing or building the wall, and compensation for the use of the premises of which he was deprived while they were undergoing repairs.—Fisher v. Goebel, 475.
3. *Improvements.*—It is not enough for the tenant to offer to fulfil the covenants of his lease so as to obtain permission from his landlord to remove the improvements he has erected upon the demised premises. He must first fulfil his covenants, and then he may have the legal right to remove his improvements without any permission.—Clemens v. Murphy, 121.
4. *Assignee—Possession.*—The assignee of the landlord by deed may recover, under a landlord's warrant, possession of the premises demised upon making demand of the rent due and exhibiting to the tenant in possession the deed under which he claims title—R. C. 1855, p. 1018.—Fanning et als. v. Voelker, 129.
5. *Waiver of Forfeiture—Rents—Renewal of Lease.*—The acceptance of rent by the landlord after full notice or knowledge of the breach of condition for which a forfeiture might have been demanded, is a waiver of the forfeiture, which cannot afterwards be asserted. To show a waiver and the determination of the landlord to disclaim the reversion and continue the lease, slight acts are sufficient, and any recognition of a tenancy as subsisting after the right of entry has accrued and the lessor has notice of the forfeiture will have the effect of a waiver. Where an estate in land has become subject to forfeiture by non-performance of conditions at the day, the forfeiture will be waived by accepting performance at a subsequent day, and the acceptance of the performance of a new and substituted agreement will have the same effect. A landlord having waived his right to declare a forfeiture, cannot afterwards refuse to comply with his covenants for a renewal of the lease.—Garnhart v. Finney, 449.

LANDLORD AND TENANT (*Continued*).

6. *Estoppel*.—A landlord may by his acts be estopped from setting up a breach of the conditions of the lease and demanding a forfeiture.—*Garnhart v. Finney*, 449.
7. *Attachment*.—In an attachment under the Landlord and Tenant Act, the intention of the tenant in removing personalty from the premises is immaterial; the proper question is, does the removal of the property endanger the rent of the landlord?—*Morris et al. v. Hammerle*, 489.

## LANDS AND LAND TITLES.

See CONVEYANCES. EJECTMENT. EQUITY.

1. *Revenue—Register's Deed*.—The deed of the Register is *prima facie* evidence of title in the purchaser at a tax sale only when the deed is duly acknowledged and recorded in conformity with the statute relating to conveyances.—*Stierlein v. Daley et als.*, 37 Mo. 483, affirmed.—*Dalton v. Fenn et al.*, 109.
2. *Revenue—Collector's Certificate*.—Under the revenue act of 1857, to make the collector's certificate of sale for taxes *prima facie* evidence of right of possession in the purchaser at the sale, the certificate must be executed, acknowledged and recorded in the same manner as a conveyance of land. After the two years limited for redemption have passed, the holder of the certificate may procure a deed, but he cannot defend his possession against a party showing a legal title upon the certificate merely.—*Id.*
3. *Description—Evidence*.—Where a particular tract of land cannot be located by the calls for monuments, or for course and distance, the intent of the parties is not to fail if there be any other matter indicative of such intent.—*Schultz v. Lindell's Heirs*, 330.
4. *Limitations—Exceptions—Infancy*.—By the act of limitations, R. C. 1825, p. 510, a party within the exceptions of the statute at the time the right of entry accrued, has twenty years after removal of his disability within which to bring his action, and a purchaser under an administrator's sale takes the position of the heir.—*Id.*
5. *Accessions—Riparian Rights*.—A lot in a town or village may be entitled to the riparian right of accretions, the right turning upon the question whether or no the lot had a front upon the river. See *Jones v. Soulard*, 24 How. 51; *Smith v. Pub. Schools*, 30 Mo. 301; *LeBeau v. Gavin*, 37 Mo. 556.—*St. Louis Pub. Schools v. Risley's Heirs*, 356.
6. *Tax Receipts—Hearsay—Limitations*.—Evidence as to the payment of taxes is admissible in suits for the possession of land for the purpose of showing adverse possession, or the extent and boundaries of the land possessed.—*Id.*
7. *Confirmations—Public Officers—Surveyor*.—The act of Congress of June 13, 1812, was by its terms a direct grant of lands to all persons who could show that they came within the provisions of the first section, and no public officer could in any way impair that right by any subsequent action.—*St. Louis Pub. Schools v. Schoenthaler's Heirs*, 372.
8. *Reservation—Confirmations—School Lands—Patents*.—An inchoate claim to land duly located and presented to the Board of Commissioners under



LANDS AND LAND TITLES (*Continued*).

the acts of Congress of 1805 and 1807, and afterwards confirmed by the act of July 4, 1836, was excepted out of the reservation made for schools by the act of Congress of June 13, 1812, and was not granted by the act of June 27, 1831. After the claim has been surveyed under the confirmation, the Surveyor-General cannot survey and set apart the same land to the use of schools.—*St. Louis Pub. Schools v. Walker et al.*, 383.

9. *Confirmations—Patents—Relation.*—As between the parties, a confirmation by the act of July 4, 1836, relates back to the date of the filing of the claim with the first Board of Commissioners, where the claim had a definite location; but where land confirmed by the act of July 4, 1836, had been previously sold and patented by the United States, as between the patentee and the confirmee the confirmation has no relation backward.—*Id.*
10. *School Lands—Entry—Sale and Patent—Ejectment—Outstanding Title.*—A party in possession of land under an entry, sale, and patent issued in 1826, may, against the claim of the St. Louis Public Schools under the acts of June 13, 1812, and January 27, 1831, set up as an outstanding title a claim and confirmation by virtue of the act of July 4, 1836. The confirmee, although by the terms of the act he cannot recover the land as against the patentee, still has a right to locate other lands in lieu of those sold, and his title is not absolutely void.—*St. Louis Pub. Schools v. Walker et al.*, 383.
11. *Patents—Confirmations—Relation.*—Where two patents for the same land are issued by the United States, the elder patent conveys the absolute title, and if nothing more appear the junior patent is void. Where patents are issued upon confirmations by the Government, the legal title by relation takes effect from the first act in the inception of the title, which under confirmations of the old Board of Commissioners was the filing of the claim and papers in support thereof with the clerk; and where a confirmation was made upon a claim not filed by the claimant, the patent can relate back only to the date of the judgment of confirmation.—*Magwire v. Tyler et als.*, 406.
12. *Board of Commissioners—Jurisdiction—Confirmations.*—The Boards of Commissioners acting under the authority of the act of Mar. 2, 1805, and Mar. 3, 1807, had no jurisdiction to confirm lands to any person unless he filed his claim and made proof of title as required by the statutes, and a confirmation made without such claim and proofs is void.—*Id.*
13. *Confirmations—Patents—Practice.*—Under different confirmations under the laws of the United States, the first equities against the Government of which a court can take notice are the inceptive acts, such as filing claims, &c., required by the statutes providing for such confirmations. Prior to such acts, unconfirmed claims or inchoate titles present nothing but an equity addressed to the political power, of which courts cannot take cognizance. The decision of the Government is final as to the comparative merit of all such claims.—*Magwire v. Tyler et als.*, 406.
14. *Judgment—Estoppel—Error.*—A decree in chancery between the same parties, proceeding upon the same substantial facts and grounds of equity, is conclusive. M. brought his bill, claiming an equitable title to a part of a tract of land patented to L. upon the ground that the part claimed had been confirmed to him by the United States, and that the survey made for

LANDS AND LAND TITLES (*Continued*).

- L. was erroneous. The facts were found, and decree rendered against M. Subsequently M. procured a survey and patent for the land and brought a new bill—*Held*, that the former decree was conclusive as to the equities between the parties.—*Id.*
15. *Heirs—Administrators*.—At the death of a party his lands descend to his heirs or devisees, and the personal representative takes no interest therein but a naked power to sell for the payment of debts. The possession of the land as well as the defence of the title belong to the heirs or devisees alone, and the administrator has nothing to do with it.—*Chambers' Adm'r v. Wright's Heirs*, 432.
16. *Confirmations—Surveys—Evidence*.—A confirmation under the act of Congress of June 13th, 1812, to a lot, out-lot or common field lot by virtue of inhabitation, cultivation or possession prior to the 20th of December, 1803, supersedes any title under a French or Spanish concession subsequently confirmed by the act of July 4, 1836; but the surveys under the latter confirmation may be used as evidence to show the location and boundaries of the lot confirmed by the prior act.—*Schultz v. Lindell's Heirs*, 330.
17. *Confirmation—Evidence*.—A certificate of confirmation issued by the Recorder of land titles under the act of Congress of May 26, 1824, on proof made of cultivation, inhabitation and possession prior to December 20, 1803, is *prima facie* evidence of title under the United States.—*Bompart et als. v. Stumpff et al.*, 443.
18. *Limitations—Practice*.—It is for the jury to determine whether and at what time a continuous, open, notorious and actual adverse possession of land sued for commenced or was actually taken by the defendants.—*Id.*

## LIMITATIONS.

1. *Accruing of Action—City of St. Louis—Assessment*.—Under the provisions of the charter of the City of St. Louis (February 23, 1853), providing for the condemnation of property for streets and alleys, where the title to the land taken for a street was in dispute between parties, no cause of action accrued against the city for the damages assessed until the question of title was determined by a court of competent jurisdiction in favor of the claimant.—*Soulard v. City of St. Louis*, 144.
2. *Boats and Vessels—Accounts*.—Where it is specially agreed or impliedly understood between the parties that an account is to be kept open and continued as one account, the limitations will commence to run from the last item of the account.—*Boylan et al. v. St. Bt. Victory*, 244.
3. *Boats and Vessels—Practice—Amendments*.—In a suit against a boat or vessel, the plaintiff cannot so amend his petition as to introduce a new cause of action, especially after the time of commencing suit upon the lien has expired. The statute relating to boats and vessels being in derogation of the common law, must be strictly construed.—*Gibbons et al. v. St. Bt. Fanny Barker*, 253.
4. *Exceptions—Infancy*.—By the act of limitations, R. C. 1825, p. 510, a party within the exceptions of the statute at the time the right of entry accrued, has twenty years after removal of his disability within which to bring his

LIMITATIONS (*Continued*).

action, and a purchaser under an administrator's sale takes the position of the heir.—*Schultz v. Lindell's Heirs*, 330.

## MECHANICS' LIENS.

1. *Practice—Set-off.*—In a suit to enforce a mechanic's lien by a subcontractor, the contractor is the principal debtor who is to defend the demand of the plaintiff, and may plead as against him a set-off or counter-claim.—*Wescott v. Bridwell et als.*, 146.
2. *Contractor—Owner—Furnishing Materials—Evidence.*—In an action under the Mechanics' Lien Law, to enforce a lien for materials furnished to the contractor with the owner of the building, it is not necessary for the plaintiff to show that the materials furnished were actually used in the construction of the building; it is sufficient that (in the absence of collusion and fraud) the materials were furnished for the purpose of being used in the building. The statements of the contractor are admissible in evidence to show the purposes for which the materials were purchased.—*Morrison v. Hancock et als.*, 561.
3. *Agent—Contractor.*—The contractor with the owner for the erection of the building, under the Mechanics' Lien Law, is so far the agent of the owner that he can bind the property by all contracts for materials and labor necessary to complete the building.—*Id.*

## M

## MORTGAGE.

1. *Equity—Fraud.*—Where the sale, under a deed of trust to secure payment of a debt, was procured by fraud, by lulling the owner of the land into security by the promise of the creditor not to sell without first making demand, the court set aside the sale and granted permission to redeem. (See *S. C.*, 35 Mo. 95.)—*Clarkson et als. v. Creely et al.*, 114.
2. *Practice—Parties.*—A judgment was rendered against a defendant as a fraudulent grantee avoiding a deed made to defraud the creditors of the grantor, without making the holders of the notes secured by the grantee's mortgage or deed of trust parties to the suit. *Held*, that as the holders of the notes were not made parties, their interest could not be affected by the decree, and that, under the circumstances, the point not having been raised in the lower court, the court would not reverse the decree setting aside the fraudulent conveyance.—*Potter v. Stevens*, 229.

## N

## NEGLIGENCE.

1. *Action—Damages—Railroads.*—The court cannot single out an isolated fact, and instruct the jury as a matter of law that it amounts to negligence. Whether the action of the conductor of a railroad train in putting a party off the cars while moving very slowly, under all the circumstances of the case, amounted to negligence, was a question for the jury to determine. Whether the intoxication of the party injured contributed to the injury or not, was also a matter to be left to the jury.—*Meyer v. Pacific R.R.*, 151.

NEGLIGENCE (*Continued*).

2. *Bailments — Carriers — Railroad Corporations — Contract.*—A carrier cannot be held liable for negligence if he be prevented from performing his duty by the act of God. A snow storm which blocks up a railroad to the extent that it hinders and delays the running of cars, is such an act.—*Ballentine v. North Mo. R.R. Co.*, 491.
3. *Bailments — Carriers — Delay — Damages.*—Carriers are responsible for the natural, ordinary and proximate causes of their acts, but not for such as are remote and extraordinary. The delay occasioned to a plaintiff attempting to ship hogs, and the necessary expenses in feeding and taking care of the same, would be the natural and immediate consequence of the wrong done by the carrier in refusing to receive and ship the freight, but this cannot be said in reference to the loss occasioned either by the death or shrinkage in weight of the hogs, unless it appear that these effects were in some manner caused directly by the act of the carrier.—*Id.*
4. *Bailment — Agistment — Petition — Practice — Trials.*—A bailee taking cattle to pasture and keep is not an insurer, and is only liable for losses occasioned by his own negligence. Where the petition alleged that cattle bailed to pasture were lost through the carelessness and negligence of the bailee, the burden of proof to show negligence is upon the plaintiff; and if that be not shown, the defendant may ask the court to instruct the jury that the plaintiff is not entitled to recover.—*McCarthy v. Wolfe*, 520.
5. *Railroad Corporations.*—The peculiar character of the vehicles employed by street railroads running through the crowded thoroughfares of a city makes it incumbent upon every company to exercise care and diligence to avoid collisions and accidents; no other rule can be recognized as compatible with the safety and security of the public. But this rule does not dispense with the care and prudence required of all persons using the street in common with the railroad company.—*Liddy v. St. Louis R.R. Co.*, 506.
6. *Railroad Corporations — Municipal Corporations — Duties.*—The ordinance of the City of St. Louis regulating the running of cars on the street railroads within the limits of the city, imposes certain duties on the companies, and the violation of such regulations shows negligence in the management of the cars on such roads.—*Id.*
7. *Action — Municipal Corporations — Highways.*—Municipal corporations are bound to keep the streets and highways in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel, and if they neglect so to do they will be liable for all injuries happening by reason of their negligence; and they cannot avoid this responsibility by arrangements with other parties.—*Blake v. City of St. Louis*, 569.
8. *Action — Damages.*—No person can sustain an action for a wrong when he has himself consented or contributed to the act which occasioned his damage.—*Callahan v. Warne et als.*, 131.

## O

## OFFICER.

1. *Sheriff — Fees — Executions.*—Under the statute relating to fees, R. C. 1855, pp. 768-9, § 13, the sheriff is only entitled to half commissions when he re-

OFFICER (*Continued*).

ceives the money without making a levy, or when he makes a levy and the money is paid to the sheriff or the party entitled without a sale.—*Gaty v. Vogel*, 553.

2. *Practice—Parties—Replevin—Bond—Sheriff.*—When the coroner in executing an order for the delivery of personal property fails to take a good and sufficient bond from the plaintiff in the action, the officer and his securities will be liable upon the official bond to the party injured by such neglect; and where the property is taken from the sheriff who had levied upon the same, the plaintiff in the execution has such an interest in the property that he may maintain the action.—*State to use, &c. v. Boisliere et als.*, 566.

## P

## PARTITION.

*Practice—Parties.*—In a suit for partition of land, the trustee and *cestui que trust* in a deed conveying a part of the premises are properly made parties for the purpose of binding their interest although no relief be prayed against them. (*Alexander v. Warrance*, 17 Mo. 228, commented upon and explained. See *Metcalf et al. v. Smith's Heirs*, 572.)—*Reinhardt et als. v. Wen. deck et als.*, 577.

## PRINCIPAL AND AGENT.

1. *Contract—Sealed Instrument.*—An agent, to bind his principal by deed, must have authority under seal. Although an instrument purporting to be sealed may be invalid as a deed, it may be evidence of a contract between the parties.—*Shuetze et al. v. Bailey et als.*, 69.
2. *Authority.*—The authority of an agent may be shown by the subsequent ratification of his acts by the principal.—*Id.*
3. *Contract.*—If the agent be false to his trust, or wrong his principal, the latter has his remedy; but a party trusting him in good faith, within the scope of his authority, cannot suffer thereby.—*King v. Pearce*, 222.
4. *Mechanic's Lien—Owner—Contractor.*—The contractor with the owner for the erection of the building, under the Mechanics' Lien Law, is so far the agent of the owner that he can bind the property by all contracts for materials and labor necessary to complete the building.—*Morrison v. Hancock et als.*, 561.
5. *Boats and Vessels.*—The agent can bind the boat by his contracts in behalf of the owner.—*Morrison et al. v. St. Bt. Laura*, 260.
6. *Factor—Trust—Usage.*—Where an agent acts for an agreed compensation, or where there is no contract for a reasonable compensation, he will not be allowed to retain profits incidentally made in the execution of his duty, although it may have the sanction of usage. Where a person is actually or constructively an agent, all profits made in the business, beyond his ordinary compensation, are for the benefit of his employers.—*Jacques et als. v. Edgell et al.*, 76.

## PRACTICE, CIVIL.

## PARTIES.

1. *Action—Interpleader*.—One of the two parties claiming property in the hands of a third party, cannot bring a suit of equity against the other claimant and the holder, to have the rights of the parties determined as upon a bill of interpleader. A bill of interpleader lies only when the party holding the property asserts no interest therein, and is threatened with suits by different persons claiming the same property.—*Hathaway v. Foy et al.*, 540.
2. *Bills and Notes—Parties*.—The payee and holder of a note may institute suit thereupon in his own name, and it is no defence that he holds the note as trustee for a third party.—*Nicolay v. Fritschle*, 67.
3. *Party—Execution—St. Louis County*.—Under the provisions of the statute "concerning the duties of sheriff in St. Louis county," of March 3, 1855, and March 14, 1859, the beneficiary in a deed of trust of personal property may file his claim with the sheriff, and sue upon the bond taken. He is a party in interest under the statute. See R. C. 1865, ch. 165, secs. 28 & 29, —State to use, &c. v. McKellops et al., 184.
4. *Fraudulent Conveyance*.—A judgment was rendered against a defendant as a fraudulent grantee avoiding a deed made to defraud the creditors of the grantor, without making the holders of the notes secured by the grantee's mortgage or deed of trust parties to the suit. *Held*, that as the holders of the notes were not made parties, their interest could not be affected by the decree, and that, under the circumstances, the point not having been raised in the lower court, the court would not reverse the decree setting aside the fraudulent conveyance.—*Potter v. Stevens*, 229.
5. *Parties—Replevin—Bond—Officer—Sheriff*.—When the coroner in executing an order for the delivery of personal property fails to take a good and sufficient bond from the plaintiff in the action, the officer and his securities will be liable upon the official bond to the party injured by such neglect; and where the property is taken from the sheriff who had levied upon the same, the plaintiff in the execution has such an interest in the property that he may maintain the action.—State to use, &c., v. Boisliniere et als., 566.
6. *Parties—Partition*.—In a suit for partition of land, the trustee and *cestui que trust* in a deed conveying a part of the premises are properly made parties for the purpose of binding their interest although no relief be prayed against them. (*Alexander v. Warrance*, 17 Mo. 228, commented upon and explained. See *Metcalf et al. v. Smith's Heirs*, 572.)—*Reiphardt et als. v. Wendeck et als.*, 577.
7. *Boats and Vessels—Waiver of Lien—Note*.—A party having a lien upon a boat and taking a note for the amount thereof, may prosecute a suit against the boat in his own name to the use of his assignee, if he have the note ready at the trial to be delivered up and cancelled.—*Aiken et al. v. St. Bt. Fanny Barker*, 257.
8. *Release—Co-obligors—Bonds*.—The release of one of several co-obligors does not discharge the other parties to the contract.—R. C. 1855, p. 873, § 14.—State to use, &c. v. Atherton et al., 209.



PRACTICE, CIVIL (*Continued*).

## PLEADINGS.

9. *Exhibits*.—No reference to papers which are mere exhibits in a cause can make the contents of such papers parts of the pleading.—*Kern v. South St. Louis Mut. Ins. Co.*, 19.
10. *Mechanics' Liens—Set off*.—In a suit to enforce a mechanic's lien by a sub-contractor, the contractor is the principal debtor who is to defend the demand of the plaintiff, and may plead as against him a set-off or counter-claim.—*Wescott v. Bridwell et als.*, 146.
11. *Causes of Action*.—Where no legal cause of action against the defendants is set forth in the petition, the judgment will be arrested.—*Langford et als. v. Sanger et als.*, 160.
12. *Surplusage*.—Damages naturally follow the breach of a contract, and the setting forth of the specifications of the evidence is faulty and vicious pleading. A petition to recover damages for breaches of a contract, should set out the contract, and then assign the breaches thereof.—*Id.*
13. *Amendments—Limitations*.—In a suit against a boat or vessel, the plaintiff cannot so amend his petition as to introduce a new cause of action, especially after the time of commencing suit upon the lien has expired. The statute relating to boats and vessels being in derogation of the common law, must be strictly construed.—*Gibson et al. v. St. Bt. Fanny Barker*, 253.

## TRIALS.

14. *Replevin—Damages*.—If in an action for the delivery of personal property the verdict be for the defendant, the measure of damages will be the value of the property at the time of its taking under the writ, with legal interest thereon up to the time of trial.—*Miller v. Whitson et al.*, 97.
15. *Damages—Negligence—Action—Instructions—Evidence*.—The existence of negligence is a fact to be proved, and for the jury to determine, when there is competent evidence tending to prove it; but the question, what facts and circumstances, being proved, amount to evidence of the existence of the main fact in issue, or tend to prove it, is a question of law. Where the evidence presented by plaintiff does not sustain the plaintiff's cause of action, it is the duty of the court so to instruct the jury.—*Callahan v. Warne et als.*, 131.
16. *Replevin Bond—Sheriff—Damages*.—A party who makes himself the principal in a replevin bond, although not the plaintiff in the suit, will be liable to have judgment entered against him as principal. A stranger taking the property out of the hands of the sheriff by an action for the delivery of personal property, will be liable, if he fail to show title, for the whole value of the property taken out.—*Frei v. Vogel*, 149.
17. *Supreme Court—Evidence*.—Where there is a total failure of evidence tending to prove the issue, the court may determine the whole case as a matter of law; but where there is presented legal evidence tending to prove the issue, the jury must determine what weight shall be attached thereto.—*Meyer v. Pacific R.R.*, 151.

PRACTICE, CIVIL—TRIALS (*Continued*).

18. *Instructions*.—Where the court refuses instructions as prayed, but gives them in a modified form, the party asking the instructions may treat them as refused, and save his exceptions.—*Id.*
19. *Action—Damages—Negligence*.—The court cannot single out an isolated fact, and instruct the jury as a matter of law that it amounts to negligence. Whether the action of the conductor of a railroad train in putting a party off the cars while moving very slowly, under all the circumstances of the case, amounted to negligence, was a question for the jury to determine. Whether the intoxication of the party injured contributed to the injury or not, was also a matter to be left to the jury.—*Meyer v. Pacific R.R.*, 151.
20. *Depositions*.—Exceptions to questions and answers, made during the taking of a deposition, must be presented to the court and passed upon at the trial. The whole deposition cannot be excluded because part of the testimony is objectionable.—*Webster et al. v. Canmann et al.*, 156.
21. *Instructions*.—To authorize the giving of instructions there must be evidence upon which they can be predicated.—*Ryan v. Spalding et als.*, 165.
22. *Witness—Striking out Answer*.—Under the provisions of the statute, R. C. 1855, p. 1577, § 4, if a party summoned as a witness fails to appear to testify, his answer or petition may be stricken out and judgment rendered accordingly.—*Snyder v. Raab*, 166.
23. *Instructions*.—The court should give or refuse the instructions asked by counsel in the language in which they are prayed. A modification made in an instruction asked is equivalent to a refusal of the instruction as prayed.—*Exchange Bank v. Cooper*, 169.
24. *Entries—Attorneys—Clerk*.—It is the duty of attorneys to see that the proper entries of the action of the court are made by the clerk. Where the attorneys had agreed that a motion for new trial should be continued until the next term, and so stated to the court, which did not dissent, and subsequently the motion was called up and overruled; and the plaintiff, at the next term, filing a motion, based upon affidavits setting forth the facts, to set aside the entry overruling the motion and to have the proper entry made,—the Supreme Court directed the entry to be set aside as irregular, on the ground that the hearing of the motion had been continued, and ordered that the entry of continuance should be entered *nunc pro tunc*, and that the motion should be regularly heard.—*Spalding v. Meier et als.*, 176.
25. *Non-suit—Proviso*.—Where the defendant answers and pleads a set-off and counter-claim, he cannot, if the plaintiff fail to appear at the trial, take a verdict and judgment for the amount of his set-off and counter-claim. The proper judgment is that of non-suit of the plaintiff, or a dismissal of his suit.—*Nordmanser v. Hitchcock*, 178.
26. *Fraudulent Conveyances—Use of Grantors—Creditors*.—Where it is apparent upon the face of the deed of assignment or mortgage made by insolvent debtors that the deed was made for the purpose of hindering, delaying or

PRACTICE, CIVIL—TRIALS (*Continued*).

defrauding creditors, it is the duty of the court to instruct the jury that the deed is void, and the question of the intent of the grantors should not in such case be left to the determination of the jury. And when upon the face of the deed of assignment it appeared that the parties supposed that there would be a large surplus after paying the debts described, and the whole property was protected from all forced sales or attachments and levies for the period of two years, during which period the management of the business was to be under the supervision of the grantors—*held*, that upon its face the deed appeared to be made for the purpose of hindering, delaying and defrauding creditors, and was void.—*Bigelow et als. v. Stringer et als.*, 195.

27. *Continuance*.—The ruling of the court in refusing to grant a motion for a continuance being entitled to every intendment in its favor, its judgment not revised.—*King v. Pearce*, 222.
28. *Exceptions*.—Where objections are made to the admission of evidence, the bill of exceptions must show the reasons upon which the objections were founded.—*St. Louis Pub. Schools v. Risley's Heirs*, 356.
29. *Discretion*.—The Supreme Court will not review the discretion of the inferior court in admitting evidence out of its proper order.—*St. Louis Pub. Schools v. Risley's Heirs*, 356.
30. *Evidence—Exceptions*.—If objection be made to the admissibility of a written contract read upon, the reasons for the objection must be stated in the bill of exceptions.—*Harris v. Brevator*, 599.

## NEW TRIALS.

31. *Newly discovered Evidence*.—An application for new trial upon the ground of newly discovered evidence must show that the party has used all due diligence, and that the evidence is competent, material, and not cumulative.—*Miller v. Whitson et al.*, 97.
32. *Neglect—Attorneys*.—The Supreme Court is never inclined to interfere with the discretion of the inferior courts in their action in refusing to grant new trials, unless a strong case is made out showing a palpable abuse of a sound discretion, and where the injustice complained of is not traceable to the negligence of the party. Where a cause is regularly docketed and set for trial, it is no excuse for the party who has suffered, that his attorney was absent, or did not attend to the suit.—*Nordmanser v. Hitchcock*, 178.
33. *Setting aside Non-suit—Mistake of Counsel*.—Non-suit set aside upon payment of costs, under the circumstances, it appearing that the counsel had given a mistaken construction to the statute and the decisions of the court thereupon.—*Boyce's Trustees v. Mooney et al.*, 104.
34. *Default—Negligence*.—To authorize the setting aside of a judgment on account of the want of defence at the trial, the defendant must show that all due diligence has been used by himself and his attorneys.—*Bosbyshell v. Summers et al.*, 172.
35. *Error*.—For error apparent upon the face of the record, the Supreme Court

PRACTICE, CIVIL (*Continued*).

## SUPREME COURT.

- will reverse a judgment, although the party complaining of the judgment has failed to present his exceptions properly.—*Nordmanser v. Hitchcock*, 178.
36. *Judgment*.—The Supreme Court may affirm a judgment as to some of the parties, and reverse it as to others.—*Wescott v. Bridwell et als.*, 146.
37. *Trials—Jury*.—It is the province of the jury to decide upon the credibility and weight of testimony; and where evidence is presented legally tending to support the issues, the Supreme Court will not review the finding of the jury.—*Blumenthal v. Torini*, 159.
38. *Exceptions—Error*.—The Supreme Court will not review the judgment of the court below unless error appear of record, or exceptions be taken and preserved.—*Wenst v. Schroeder*, 602.
39. *Briefs*.—Appeal dismissed upon failure of appellant to file statement and brief.—*State to use, &c. v. Leutzing et als.*, 603.
40. *Assignment of Errors—Briefs*.—Judgment affirmed, appellants failing to assign errors and file statement and brief.—*Cogswell et al. v. Randolph et als.*, 603.
41. *Verdict*.—Verdict for the right party.—*Garesché v. Deane*, 168.

## PRACTICE, CRIMINAL.

See CRIMES. COURTS.

## R

## REVENUE.

1. *Corporations, Foreign—Residence*.—A corporation is a resident subject or citizen of the State in which it is created, regardless of the residence of its members or stockholders; but although the corporation itself cannot migrate or go out of the State creating it, it may by its agents act beyond the bounds of the State in which it exists, and thus become liable in other States to service of process upon its agents, and its property locally situate in such States may be subjected to taxation.—*City of St. Louis v. Wiggins Ferry Co.*, 580.
2. *Residence—Personal Property—Assessment*.—The personal property of a resident actually situated beyond the limits of this State, is without its jurisdiction, and cannot be assessed for taxation in this State; but the property of a non-resident is taxable here if it be found situate within the local jurisdiction, whether in the hands of the owner or his agents.—*Id.*
3. *Corporations, Municipal and Foreign—Boats and Vessels*.—Ferry boats owned by a corporation created by the laws of the State of Illinois, and running between the Illinois and Missouri shores, are subject to taxation in this State, and by municipal corporations, if the companies owning said boats have an office for the transaction of business in this State within the limits of such city or town. For the purposes of taxation, such foreign corporation having an office and doing business within this State is to be considered a resident.—*Id.*

REVENUE (*Continued*).

4. *Municipal Corporations—Special Tax—Lien.*—Under the charter and ordinances of the City of St. Louis, the lien of the special tax for the making and repairing of streets and alleys commences from the date of the assessment of the tax by the city engineer after the work is completed.—*Anderson v. Holland*, 600.
5. *Conveyance—Register's Deed—Lands and Land Titles.*—The deed of the Register is *prima facie* evidence of title in the purchaser at a tax sale only when the deed is duly acknowledged and recorded in conformity with the statute relating to conveyances—*Stierlein v. Daley et als.*, 37 Mo. 483, affirmed.—*Dalton v. Fenn et al.*, 109.
6. *Conveyance—Collector's Certificate—Lands and Land Titles.*—Under the revenue act of 1857, to make the collector's certificate of sale for taxes *prima facie* evidence of right of possession in the purchaser at the sale, the certificate must be executed, acknowledged and recorded in the same manner as a conveyance of land. After the two years limited for redemption have passed, the holder of the certificate may procure a deed, but he cannot defend his possession against a party showing a legal title upon the certificate merely.—*Id.*

## S

## SECURITIES.

1. *Principal and Surety—Bonds—Damages.*—Where the principal in a bond, given to secure the faithful performance of his duties as a teller of a bank, had, previous to the execution of the bond, taken and appropriated to his own use moneys of the bank, and after the giving of the bond had applied moneys received to wrong accounts so as to cover up his defalcation—*held*, that the security was not liable for the defalcation committed before the execution of the bond; and that for the mere misapplication of the moneys subsequently received to wrong accounts, the damages could be only nominal.—*State to use, &c. v. Atherton et al.*, 209.
2. *Principal and Surety—Witness—Party.*—The principal in a bond, defendant in a suit against whom a judgment by default has been rendered, is a competent witness for his co-defendant, the surety in the bond.—*Id.*
3. *Principal and Surety—By-laws.*—The negligence of the directors and cashier of a bank in failing to comply with the by-laws of the corporation in examining its affairs, counting its cash, &c., &c., will not discharge the sureties upon the bond of the teller, who has committed a breach of his obligations by applying the moneys of the bank to his own use.—*State to use, &c. v. Atherton et al.*, 209.

## U

## USES AND TRUSTS.

See EQUITY, 4, 6, 7, 8.

## V

## VENDORS AND PURCHASERS.

1. *Lien—Watver.*—Where the vendor sells land and takes collateral security for the purchase money, he will be considered as waiving his lien upon the land conveyed.—*Sullivan v. Ferguson et als.*, 79.

VENDORS AND PURCHASERS (*Continued*).

2. *Fixtures—Lands and Land Titles.*—Lamps, chandeliers, candelabra, sconces, brackets, and the various contrivances for lighting houses by means of candles, oil or other fluids, or gas, are not fixtures, and do not form part of the freehold so as to pass by a sale of the realty. Where in the erection of a church a recess was left to receive an organ, which was required to complete the design and finish of the building, the organ being attached to the floor and intended to be permanent—*held*, that the organ was to be considered as affixed to the freehold, and passed, as between vendor and vendee, by a sale of the realty.—*Rogers et als. v. Crow et als.*, 91.

## W

## WILLS.

1. — *Legatees and Devisees—Marshalling Assets.*—The testator by his will directed his executors to pay off and discharge all his debts out of his estate as soon as could conveniently be done after his decease; he then bequeathed and devised his estate by specific legacies and devises to his wife and his children in nearly equal parts. The executors, from the rents of the realty, paid off the debts. Upon a bill to marshal assets, *held*, that as the testator had designated no specific fund from which the debts were to be paid, it was his intention that the devisees and legatees should contribute ratably to the abatement of the encumbrance, and that the whole burden of the debts could not be thrown upon the personal estate.—*Brant's Will*, 266.
2. *Dower—Devise—Election.*—A widow may always refuse to take under a will as a devisee or legatee, and may fall back on her claim for statutory dower, but she cannot claim under the will and under the statute at the same time; she must make her election, and claim under the one and reject the other. The widow does not take under the will as a purchaser, so as to have the portion bequeathed and devised to her discharged from liability for payment of the debts of the testator, when the burden of the debts is imposed generally upon the whole of the estate.—*Brant's Will*, 266.
3. *Construction of Will—Vesting—Mixed Estate consisting of Realty and Personalty, Rules applicable to the former prevail—Case considered under both aspects—Trust—Discretionary Powers of Trustees—Discretion subsequent—Condition imposing extra-judicial duty on Court, not binding.*

The testator George Collier, Sen., by his will, after bequeathing various specific legacies, and making provision for his wife in lieu of dower, by the 17th clause devised and bequeathed the residue of his estate—which was very valuable and consisted principally of realty—to trustees (who were also appointed executors) in trust, for the uses and purposes therein specified. After prescribing the powers and duties of the trustees as to the management, improvement and disposition of the estate, and providing for the education, maintenance and advancement of his children, all of whom he names, he adds: "And when my said son Dwight shall attain the age of twenty-one years, I wish and require my said executors and trustees immediately to settle up my estate, and divide the same out among my said children as hereinafter mentioned, as far as it may be practicable." Each division or partition was to be submitted to the St. Louis Probate Court for



WILLS (*Continued*).

its approval, and if approved was to be binding and conclusive. He then continues: "In making partition as aforesaid, I wish and direct that each and all my said children shall receive equal portions or shares, as my affection and parental regard for them all know no distinction. But if, from Providential visitation or unforeseen casualty, or their own bad conduct—none of which contingencies or misfortunes I hope may ever intervene—my said trustees shall think it right and proper and safest and best, under all the circumstances, to make any difference or distinction among my said children or any of them, in making any of the divisions or partitions as above provided for, they are hereby vested with full power and authority to do so, as fully and to all intents and purposes as I myself could do if living at the time; such discrimination always, however, to be subject to the approval of the said Probate Court as aforesaid. But if all my children shall be worthy, no distinction or difference shall be made among them merely because one or some of them may be deemed by my said trustees more worthy than the others of them. The shares or portions of my estate which shall be thus set apart to my children shall be held by them in their own several rights under the full and perfect legal title—to them and to their heirs, executors, administrators, and assigns, forever." All the children named in the said clause survived the testator; but Henry, the youngest, (an infant), and George, Jr., an adult, died afterwards and before the said son Dwight had become of age. George, Jr., died testate, and leaving a widow but no children. *Held*, on petition of the trustees for the advice and directions of the court, that George and Henry took vested and transmissible estates under the will.

The law favors the vesting of estates; a devise or bequest therefore in favor of a person *in esse* simply (i. e. without any intimation of a desire to suspend or postpone its operation) confers an immediately vested interest.

Where words of futurity are introduced into the gift, the question arises, whether the expressions are inserted for the purpose of protracting the vesting, or point merely to the deferred possession or enjoyment.

This being a mixed gift or devise, the rules applicable to realty control.

The doctrine of *Boraston's case*, 3 Coke, 19, recognized and applied.

But no essential difference would be found to exist if the gift concerned personalty exclusively. Directions to pay, to transfer, to divide and partition, import a gift, unless restricted by some inconsistent limitation or condition. The constitution of this trust leads irresistibly to the inference that a gift was intended, and that the gift to the trustees was for the benefit of the children only.

The postponement of the division and partition being apparently more for the benefit and convenience of the estate than for any consideration personal to the devisees, could not prevent the vesting.

There is no limitation over of the respective interests, showing any purpose in the testator that the children should not receive their shares at all events. The consequence of holding that the devisees took no immediate interest would be, that, if any of them died before the period of division leaving children, those children would be wholly unprovided for. Parents are not generally actuated by such intentions, and, unless apparent and unmistakable, they will not be ascribed to them.

WILLS (*Continued*).

It is immaterial that the money is not to be paid or the property divided till a future period. It is scarcely distinguishable from a bond for the payment of money at a future date. It is *debitum in presenti*, though *solvendum in futuro*.

The children take by virtue of the will, and not by appointment under the power conferred on the trustees. The action of the trustees is not a condition precedent to the vesting of the estate in the devisees, and whatever power they may have to make a difference or distinction on account of casualty or bad conduct, is a discretion subsequent; nor is there anything to indicate that the testator intended to exclude a child from partition by death. The death of two of the children prevents the trustees from making any distinction or difference as to them, and so far as they are concerned there is nothing to evoke the power given.

The condition that the action of the trustees should be approved by the Probate Court is unimportant. The duty imposed upon the court is wholly extra-judicial, and its sanction could impart no validity to the proceedings. If the trustees neglect or refuse to act, or abuse their trust, they are amenable to a court of equity, which will always assert its jurisdiction in such cases.

*Execution of Testamentary Power.*—The will of G. C., Jr., contained the following clauses: "2. I give and bequeath to my dearly beloved wife, Harriet K. Collier, the entire usufruct of my estate, real, personal and mixed, of every description, wherever situated at the time of my death, so that she may enjoy the sole and entire revenue and income thereof during her life. 3. I give to my said wife the absolute right to dispose of one-half of my said property at her decease, by testamentary disposition, as she may deem right and proper." The disposing part of the will of Harriet K. Collier was as follows: "I give to my dear mother, Mary Kearny, the entire property of which I die possessed, wherever situated, real, personal and mixed, of every character and description, including any and all rights acquired by me under the will of my late husband, to enjoy the sole and entire use of the same during her life," &c. *Held*, that here is a direct reference to the power, and in a manner so explicit as to leave no room for doubt as to the intention, and that this was a valid and operative execution of the power.—Collier's Will, 287.

## WITNESSES.

1. *Evidence.*—The assignor of a policy of insurance is a competent witness to prove that there was no consideration for the assignment.—Perry et al. v. Siter et al., 37 Mo. 273.—Bidwell et al. v. St. Louis Floating Dock & Ins. Co., 42.
2. *Striking out Answer.*—Under the provisions of the statute, R. C. 1855, p. 1577, § 4, if a party summoned as a witness fails to appear to testify, his answer or petition may be stricken out and judgment rendered accordingly.—Snyder v. Raab, 166.
3. *Principal and Surety—Party.*—The principal in a bond, defendant in a suit against whom a judgment by default has been rendered, is a competent witness for his co-defendant, the surety in the bonds.—State to use, &c. v. Atherton, 209.

